86-465

No. ———

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

FLORIDA ROCK INDUSTRIES, INC.,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

I. Whether the denial of a dredge and fill permit by the U. S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C.§ 1344 (1982), constitutes a taking under the fifth amendment where the property can be put to no viable economic use without such a permit.

II. Whether the federal government may avoid the payment of just compensation under the fifth amendment by showing that property which has no viable economic use by virtue of a federally imposed regulation nevertheless retains a fair market value based on possible sale to speculators who "bet" that the very regulation on which the taking claim is premised will "some day be lifted."

III. Whether the Corps' denial of a permit to fill a portion of petitioners' property presents a ripe claim for a taking of the whole where: (1) the permit was limited at the directive of the Corps and an application for the entire property would not have been processed; (2) the portion of the property for which the permit was denied was the most likely to be granted; and (3) the trial judge has found that, if sought, a permit for the balance of the property would not have been granted.

LIST OF PARTIES TO PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Federal Circuit.

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FLORIDA ROCK INDUSTRIES, INC.,
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 791 F.2d 893 (App.3). The orders of the Court of Appeals denying rehearing and denying the suggesstion for rehearing in banc are not not reported (App.1-2). The opinion of the United States Claims Court on liability is reported at 8 Cl.Ct.160 (App. 31); the order on valuation of the Claims Court, entered following the trial on damages, is not reported (App.72).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was rendered May 14, 1986. The petition for rehearing was denied on June 26, 1986 (App.1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

"nor shall private property be taken for public use, without just compensation."

Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (as amended):

"*Permits for dredged or fill material.*

"(a) Discharge into navigable waters at specified disposal sites.

"The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

"(b) Specification for disposal sites.

"Subject to Subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in con-

junction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) Denial or restriction of use of defined areas as disposal sites.

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

33 U.S.C.§ 1344(a)-(c) (1982).

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Federal Circuit from which this petition is taken reverses a taking judgment entered after lengthy trials on liability and damages by the United States Claims

Court, Alex Kozinski, Chief Judge. The trial judge had held that the denial by the Army Corps of Engineers of a dredge and fill permit to mine limerock on petitioner's property deprived petitioner of all viable economic use of its property, thereby entitling it to just compensation under the fifth amendment and the Tucker Act, 28 U.S.C. § 1491. The Court of Appeals for the Federal Circuit, Nichols, Senior Circuit Judge, reversed, holding that the trial court improperly failed to consider the fact that the property retained a substantial "fair market value" based on possible sale to speculators anticipating a future change in the Corps' regulations (App.24).

In March 1972, petitioner, Florida Rock Industries, Inc. ("Florida Rock"), a Jacksonville-based company engaged in the mining, processing and sale of crushed stone and aggregates for use in construction, agreed to purchase approximately 2½ square miles (1,560 acres) of unimproved wetlands located several miles west of metropolitan Miami and east of the Everglades National Park in Dade County, Florida. Rock mining was and is common in the area where the property is located, and the property contains an extremely high quality limestone, with test borings indicating estimates of at least 100,000 tons of rock per acre. Important to its intended use was the fact that the property was located on U.S. 27, a major highway, and that the property had right-of-way access to the Seaboard Coastline Railroad, one of the state's two rail lines (App.32).

At the time Florida Rock purchased the property, it had all of the necessary state and local permits, or waivers, to mine limestone, and there were no applicable federal statutes or regulations (App.33).

In October 1972, Congress adopted the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251, *et seq.*, which gave the Army Corps of Engineers jurisdiction to issue permits for discharge of materials into the "waters of the United States." In 1977, the Corps issued regulations extending its permit jurisdiction to wetlands such as those which exist on the subject property.[1]

Because of the economic recession which severely limited construction in Florida, no mining activity took place on the property in the mid-1970s. Unaware of the Corps' jurisdiction or the need to obtain a federal permit, petitioner began mining the property in July 1978. When its activities were discovered, the Corps issued a cease and desist order which prohibited petitioner from mining any portion of its property absent a permit from the Corps, and further required, as a condition for considering a permit application, the restoration of the property to its pre-1977 condition (App.34).

Because a directive from the Corps' district engineer restricted permit applications to a maximum period of three years, petitioner, on October 1, 1979, submitted an interim permit application to mine 98 acres of its property, clearly stating its intention to mine the entire 1,560 acres. On October 2, 1980, the Corps denied petitioner's permit application, and Florida Rock thereafter brought suit under the Tucker Act, claiming that the denial of the permit con-

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[1] This Court, in *United States v. Riverside Bayview Homes, Inc.*, — U.S.—, 106 S.Ct.455 (1985), recently upheld the extention of those regulations to wetlands.

stituted a taking of its entire property because there were no economically viable uses to which the land could be put absent a permit from the Corps (App.34).

During the course of a lengthy trial on liability, Florida Rock offered evidence which established that the property was too wet for agricultural use and too remote for commercial, industrial or residential development; in short, that it had no viable economic use except rock mining, which, in wetlands areas, requires dredge and fill activity (App.35). Moreover, it was shown that there was no other active use to which the property could be put which was less environmentally damaging that rock mining, and, further, that petitioners' permit denial was the result of

> "a deliberate, but unannounced, policy of 'zoning' the area west of the Dade-Broward Levee, north of the Tamiami Trail and east and south of Krome Avenue [where the property is located] as undisturbed wetlands where no significant development would be permitted." App.68-69 n.23.

Thus, the testimony established, and the trial judge found, that the denial of the permit for rock mining demonstrated that no fill permit would be granted for any portion of the property (App.35).

In response, the government offered testimony as to the fair market value of the property (later relied on by the Court of Appeals) from a real estate appraiser who acknowledged that under existing Corps regulations the property had no current economic use, but estimated its value at $3,500 per acre, based upon sales to long-term speculators and investors who believe that the current Corps regulations will change to permit future develop-

ment of the property. The government also attempted to offer evidence of an alleged offer in June 1981, to purchase a portion of the property for $4,000 per acre (likewise relied upon by the appeals court), but after objections challenging the hearsay nature of the evidence and the fact that an unaccepted offer to buy or sell is inadmissible to establish market value[2], *withdrew* the evidence concerning the alleged offer.

Following this liability trial in January 1984, Chief Judge Alex Kozinski orally announced his findings, later reduced to a written opinion (App.31), a portion of which may be summarized as follows:

(1) Florida Rock purchased the property for rock mining and had reasonable economic expectations of such use at the time that it bought the subject property;

(2) The permit denial deprived Florida Rock of all economically viable uses of the property;

(3) The property at issue has only one economically viable use, that is, for rock mining;

(4) At least as to the 98 acres which were the subject matter of the application, the denial of the permit constitutes a taking by the United States;

(5) Sales based on speculation that existing regulations may change, where there is no evidence of the reasonable probability of change, does not establish a viable economic use so as to defeat a taking claim;

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[2] *See Sharp v. United States*, 191 U.S.341, 348-49 (1903); *United States v. Smith*, 355 F.2d 807, 811 (5th Cir.1966); *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 298 (Ct.Cl.1977).

(6) When Florida Rock submitted the permit application, it had every intention to mine the entire property and it wanted to file an application for the entire 1,560 acres, but was prevented from doing so by the Corps;

(7) Had Florida Rock filed an application for the entire 1,560 acres, it would have been rejected and denied by the Corps; and

(8) Florida Rock had all the required permits from Dade County to mine the entire acreage, and the State of Florida waived jurisdiction over the property (App.35).

While the trial judge ruled as a matter of law that Florida Rock had failed to exhaust its administrative remedies on the balance of its property and, therefore, that the taking was limited to the 98 acres for which the permit application was denied by the Corps, he acknowledged this issue presented an extremely close question, and to avoid the possibility of a retrial on damages, directed the parties to present valuation evidence on two bases, one assuming a taking of the entire 1,560 acres, the other based on a taking of the 98 acres for which the permit was denied.

Following a separate trial held on damages in April 1985, the trial court, using a comparable sales approach, determined that the value of Florida Rock's entire property, as of the date of the taking, was $10,580,000 ($7,500 per acre for the property fronting on U.S. 27 and $4,000 per acre for the interior property), and accepting the government's diminution in value analysis, determined the 98 acres to be worth $10,500 per acre, for a total of $1,029,000 (App.72).

Upon the government's appeal, the Court of Appeals for the Federal Circuit reversed the holding of the Claims

Court and held that a regulation which deprives an owner of all "economically viable uses of his property" nevertheless does not constitute a taking under the fifth amendment where the property retains a "fair market value" based on possible sales to investors who "bet" that the very regulation upon which the taking claim is premised might in the future be altered (App.22-23). Thus, the Federal Circuit's opinion, admittedly in the absence of prior precedent (App.19-20), rejected the viable economic use analysis applied by the Claims Court and adopted a determination based upon "diminution in market value" which compares the owner's basis or investment in the property with its fair market value before and after the alleged taking. The Court of Appeals stated:

> "Our trial court, as we read it, selected the immediate use value because it thought it prescribed by the language of the Supreme Court, read as saying that a denial of an *immediately* viable use is a taking, regardless of any fair market value analysis. No such analysis appears to have been before the Supreme Court when it gave such weight to such denial in the cases cited. We doubt very much whether the Court meant to say, or would have said, that a denial of any *immediately* viable use must be a taking even though it had no effect on the fair market value of the property. . . .
>
> "We do not perceive any legal reason why a well-informed 'willing buyer' might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted. The statute would not have to change, only the perceptions of the Army Engineers. . . . There is nothing so certain in life as that all certainties become uncertain, and some are replaced by their opposites. One who invests in land

on this faith may be a speculator, but he is not on that account a gull." App.22-23.

The Court of Appeals denied a petition for rehearing and a suggestion for rehearing in banc (App.1-2).

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ARGUMENT

Point I

The Corps' denial of a Section 404 permit for property not suitable for any viable economic use without such a permit constitutes a taking under the fifth amendment.

In *United States v. Riverside Bayview Homes, Inc.*, — U.S.—, 106 S.Ct.455, 460 (1985), this Court approved the extension of the Corps' authority under Section 404 to regulate wetlands similar to those involved here, based in part on the availability of the "Tucker Act . . . to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands . . . ." While recognizing that the Court had "never precisely defined those circumstances [where government regulations amount to a 'taking' of the affected property]" (— U.S. at —, 106 S.Ct. at 459), the Court noted that in instances involving the Corps' denial of a fill permit, the determination as to whether there has been a taking will turn on the question of whether the denial of a permit "will prevent economically viable uses of the property or frustrate reasonable investment backed expectations" (— U.S. at —, 106 S.Ct. at 460 n.6).

There can be no question that the evidence presented at trial overwhelmingly supported the trial judge's findings that there is no other viable use for this property except rock mining; that there is no other active use to which the property could be put which would be less environmentally damaging than rock mining; and, therefore, the Corps, applying the same reasoning process, would deny any application to dredge and fill the property, thus leaving the property as a wetlands storage area or as a passive recreational area without any viable economic return. As found by Chief Judge Kozinski:

> "Rock mining is the only viable economic use to which the property can be put. Some other uses (such as hunting and fishing) would not yield sufficient income to cover even real estate taxes. Because of its location, the property is not suitable for residential construction or commercial activity. In any case, construction connected with such alternative uses would require the issuance of a Corps permit. Such uses would alter the character of the land and surrounding environment much more drastically than limestone mining; it is unthinkable that the Corps would issue such a permit in light of its denial of plaintiff's application." App.35.

He further stated:

> "The court has found that denial of the permit by the Corps of Engineers made it impossible to profitably mine rock on plaintiff's property. To paraphrase Mr. Justice Holmes, '[w]hat makes the right to mine [rock] valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain [rock] has very nearly the same effect for constitutional purposes as appropriating or destroying it.' *Pennsylvania Coal*, 260 U.S. at 414 [footnote omitted]. In addition, the court has found that

> there are no other economically viable uses to which the property can be put. Denial of the permit therefore has deprived plaintiff of all economically viable use of its land. Applying the standard enunciated by the Supreme Court in *Hodel* and other cases leads to the conclusion that there has been a regulatory taking and that plaintiff is entitled to compensation." App. 37-38.

This Court has stated time and again [particularly in *Penn Central Transportation Co. v. City of New York*, 438 U.S.104, 124 (1978)], that the determination of whether a particular regulatory scheme results in a taking is highly fact-dependent and turns on an ad hoc analysis of each case. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S.393, 415-16 (1922), Mr. Justice Holmes cautioned that

> "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . This is a question of degree—and therefore cannot be disposed of by general propositions."

In *Kaiser Aetna v. United States*, 444 U.S.164, 175 (1979), this Court again acknowledged its inability to develop a " 'set formula' " for determining when " 'justice and fairness' " require that economic injuries caused by public action be compensated by the Government [quoting *Penn Central*], and stated that it therefore examined the taking question

> "by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. . . ."

Most recently in *Connolly v. Pension Benefit Guaranty Corp.*, — U.S.—, 106 S.Ct.1018, 1026 (1986), citing prior taking cases, this Court again stated:

> "In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case."

While prior taking cases by and large have come to this Court at the pleading stage, this case comes to the Court upon a full record following two trials, one on liability and another on damages, with extensive factual findings rendered orally and by written opinion by a trial judge who carefully cited and followed this Court's prior decisions. By its opinion, the Court of Appeals has ignored the trial judge's function and substituted its own factual determinations in reaching a decision not on an "ad hoc factual basis" but rather upon the policy decision that property which retains a value for sale, whether or not it can be utilized for any economically productive activity, cannot be the subject of a regulatory taking.

Clearly, if the findings of fact, supported by substantial competent evidence presented at these trials, do not demonstrate that Florida Rock has been denied all economically viable use of its property as the result of the Corps' permit denial, we respectfully suggest the taking clause of the fifth amendment has no continuing viability except in cases involving the direct physical invasion of property.

Point II

The Court of Appeals' holding that a regulation which deprives an owner of all "economically viable uses of the property" does not constitute a taking under the fifth amendment where the property retains a "fair market value" based on possible sale to investors who "bet" that the very regulation on which the taking claim is premised "would some day be lifted," departs from well-established precedent of taking law and directly conflicts with prior opinions of this Court.

The opinions of this Court have consistently held that the determination of whether a regulatory taking has occurred turns on whether the regulation "denies an owner economically viable use of his land." *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S.264, 295-96 (1981), *quoting Agins v. City of Tiburon,* 447 U.S.255, 260 (1980). *Accord Penn Central Transportation Co. v. City of New York,* 438 U.S.104, 131 (1978) ("diminution in property value, standing alone" does not establish a taking. "[T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit"). The Court again stated that the determination of a regulatory taking claim is based on whether the permit denial "will prevent economically viable uses of the property or frustrate reasonable investment backed expectations." *Riverside Bayview Homes, Inc.,* — U.S. at —, 106 S.Ct. at 460 n.6.

The Court of Appeals' opinion misapprehends and misapplies the controlling and consistent decisions of this Court in fifth amendment taking cases. The opinion rejects the viable economic use analysis mandated by and heretofore followed in this Court, and establishes an anal-

ysis based exclusively on the relationship of the owner's basis or investment in the property and a comparison of its fair market value before and after the taking.

Under the Court of Appeals' opinion, the fifth amendment has no application where property retains a market value, even though that "value" is admittedly based on speculators betting on the prospect that the very regulation which allegedly effects the taking will in the future be altered.

> "We do not perceive any legal reason why a well-informed 'willing buyer' might not bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted. The statute would not have to change, only the perceptions of the Army engineers." App.22-23.

Under such an approach, the fifth amendment analysis shifts focus from the property owner and the government to third parties from whom the property owner can possibly be made whole. The Court of Appeals cites no decisions to support this proposition.

Judge Kozinski dealt with the proposition that a residual value, based on the prospect of a change in the regulation would defeat a taking claim, as follows:

> "Common sense suggests that regulatory action will never entirely eliminate the market value of the real property it affects. Land, by its nature, is timeless; government policy, indeed any particular government entity, is inherently transitory. There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the

> concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a fifth amendment taking even though the property obviously continued to have market value [citations omitted]." App.42.

A market value analysis based on buyers willing to "bet that the prohibition of rock mining . . . would some day be lifted" (App.22-23) ignores clear precedent to the contrary and effectively erases the taking clause from the fifth amendment. Heretofore, it has been well established that where a particular use is prohibited by government regulations or is contingent upon the securing of a permit or license, such a use cannot be considered in assessing market value unless it can be demonstrated that there exists a reasonable probability that a variance or permit will be granted or that the law will change to allow that use. *See United States v. 320.0 Acres of Land, More or Less in the County of Monroe, Florida,* 605 F.2d 762, 818-19 (5th Cir.1979); *United States v. Eden Memorial Park Association,* 350 F.2d 933, 936 (9th Cir.1965). The proposed use must, in fact, be shown to be feasible and probable in the near future. *United States v. 33.90 Acres of Land, More or Less Situated in Bexar County, Texas,* 709 F.2d 1012, 1015 & n.3 (5th Cir.1983). The rule, stated by this Court is as follows:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth." *Olson v. United States,* 292 U.S.246, 257 (1934).

Thus, the *possibility* that a confiscatory regulation may change, absent the demonstration of a ***reasonable probability*** of change (which was not here shown), does not affect the determination of whether that regulation results in a taking. Were it otherwise, no regulation could ever effect a taking. As succinctly stated by Chief Judge Kozinski for the Claims Court:

> "Defendant has suggested that plaintiff's holding the land for 'long term investment,' in the hope that it will eventually become available for productive use, is itself a viable economic activity. Of course, the same could have been said of the owners of the mine in *Pennsylvania Coal,* of the Willard Hotel in *Benenson* [*Benenson v. United States,* 548 F.2d 939 (Ct.Cl.1977)] and of the unimproved land in *Althaus* [*Althaus v. United States,* 7 Cl.Ct.688 (1985)]. If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking." App.40 n.6.

The Court of Appeals' opinion recognizes that when Florida Rock acquired the property in 1972, it had the local permits necessary for rock mining, that no federal permit was required, and that it was not until after a change of federal law that Florida Rock had not foreseen, that the Corps of Engineers acquired jurisdiction in this area (App.5). Nevertheless, the Federal Circuit gives no consideration to these facts in adopting a rule which allows the government to avoid the fifth amendment by establishing a fair market value based on third parties who are "willing to bet" that regulations will change in the future. Not only is such a rule contrary

to this Court's teachings,[3] but it assures there can never be a regulatory taking. Clearly, if an existing owner does not possess sufficient investment-backed expectation in his property to enforce a taking claim against a regulatory change which deprives that owner of any active use, then certainly a subsequent buyer who purchases with knowledge of the regulation [*cf. Andrus v. Allard,* 444 U.S.51, 64 n.21 (1979)] will not have sufficient investment-backed expectations to successfully assert a taking claim. Presumably, that purchaser is relegated to sell to an even wilder speculator, at an even lower price, etc., etc. The net result is the "'Fifth Amendment's guarantee . . . [which is] designed to bar Government from forcing some people alone to bear public burdens which is all fairness and justice, should be borne by the public as a whole'" (*Penn Central, supra,* 438 U.S. at 123), is effectively abrogated.

Point III

The taking determination should be applicable to the entirety of the property where it has been established, as here, that further permit applications would be futile.

The only reason behind the requirement for conditioning a taking challenge upon denial of a permit is the reasonable expectation that the permit may be granted. As

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[3] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S.419, 436 (1982) (ability to dispose of the property by sale is a hollow right where the restraint is passed on to the purchaser). *Cf. Dickman v. Commissioner of Internal Revenue,* 465 U.S.330, 336 (1984) ("[o]f the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order").

recently expressed by this Court, "after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *Riverside Bayview Homes,* — U.S. at —, 106 S.Ct. at 459. Where, as here, the uncontroverted evidence demonstrates, and the trial judge found, that there is no prospect that a permit application for the entire property would be granted, exhaustion becomes nothing more than a time consuming, senseless, futile exercise.

While acknowledging that Florida Rock had limited its application to 98 acres solely to comply with the directive of the Corps (which would have refused to process an application for the entire property); that applying the same standards the Corps would likewise deny permits for the balance (indeed, the trial court found the denial was based on an unannounced decision to "zone" the area in question so as to maintain its continued existence as wetlands); the trial judge nevertheless held, based on failure to exhaust administrative remedies, that the taking determination did not apply to the balance of the property.

Here, the evidence is unequivocal that the application by the Corps of the same standards applied to the permit area would require denial of a permit for the entire tract, and the trial court has so found. Thus, such a future application would clearly be futile. As this Court has observed, "the doctrine of primary jurisdiction is not a doctrine of futility." *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.,* 381 U.S. 676, 686 (1965).

Holding the taking determination applicable to the entire property accords with well-established law. Al-

though, as a general proposition, a claimant asserting an "as applied" taking challenge to a land use regulation must show that he had submitted plans for development which were subsequently rejected, *see Agins v. City of Tiburon,* 447 U.S.255, 260 (1980); *American Savings & Loan Ass'n v. County of Marin,* 653 F.2d 364, 370 (9th Cir. 1981), the courts have recognized an exception to this principle where an attempt to secure approval for use of the property would be futile. *See e.g., Martino v. Santa Clara Water Valley District,* 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied,* 464 U.S.847 (1983). This "futility" exception applies regardless of whether the requirement of submitting permit applications is analyzed in terms of a ripeness issue or an exhaustion of administrative remedies matter.

To limit the judgment to the 98 acres for which a permit was sought in accordance with the instructions of the District Engineer is contrary to the rule (of which the government has been the beneficiary in countless cases), that the property must be viewed as a whole, and violates fundamental fairness. In *Penn Central,* this Court emphasized that:

> "'Taking' Jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . . " 438 U.S. at 130.

Requiring Florida Rock to resubmit a permit application for the balance of the 1,560 acres, where the initial application was submitted at the insistence of the govern-

ment and when the outcome of such a submission is preordained, would constitute a "manifest injustice." *See, e.g., Green v. United States,* 376 U.S.149, 160 (1964), and *Buccaneer Point Estates, Inc. v. United States,* 729 F.2d 1297, 1299 (11th Cir.1984). Accordingly, the taking determination should be made applicable to the entirety of Florida Rock's property.

CONCLUSION

For the above-stated reasons, petitioner respectfully requests the Court to issue a writ of certiorari to the Court of Appeals for the Federal Circuit remanding the case for an affirmance of the trial court's determination as to the taking, with instructions to enter judgment for Florida Rock as to the entire 1,560 acres in the amount set out in the Order on Valuation (App.72).

Respectfully submitted,

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For Petitioner

In The

Supreme Court of the United States

October Term, 1986

———o———

FLORIDA ROCK INDUSTRIES, INC.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

———o———

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

———o———

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

———o———

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2588
85-2609

FLORIDA ROCK INDUSTRIES, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

Before DAVIS, *Circuit Judge,* COWEN and NICHOLS, *Senior Circuit Judges,* and BALDWIN and BISSELL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart, Clerk

6/26/86
Date

cc: Mr. Fred R. Disheroon, DOJ
Mr. Sam Kazman
Mr. John A. DeVault, III
Ms. Nancy S. Marks

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2588
85-2609

FLORIDA ROCK INDUSTRIES, INC.,
Appellee/Cross-Appellant,

v.

THE UNITED STATES,
Appellant/Cross-Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

Judge Archer did not participate in the declination of the in banc suggestion.

FOR THE COURT

/s/ Francis X. Gindhart, Clerk

7/8/86
Date

cc. Mr. Fred R. Disheroon, DOJ
Mr. Sam Kazman
Mr. John A. DeVault, III
Ms. Nancy S. Marks

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-2588
85-2609

FLORIDA ROCK INDUSTRIES, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

DECIDED: May 14, 1986

Before DAVIS, *Circuit Judge,* COWEN and NICHOLS, *Senior Circuit Judges,* and BALDWIN and BISSELL, *Circuit Judges.*

NICHOLS, *Senior Circuit Judge.*

This appeal from the Claims Court confronts us with important and novel issues as to the application of the fifth amendment and, consequently, the Tucker Act, 28 U.S.C. § 1491, to measures by the Secretary of the Army, through the Army engineers under authority of the Clean Water Act, 33 U.S.C. § 1251(a)(1) and ff, to protect Florida wetlands against disturbance by the owner's limestone mining. At times, as by the holding below here, what were intended as mere regulations are converted by force of law into involuntary purchases called "takings." We have the benefit of amicus briefs supporting both sides. We consider it is not legally impossible that the regulatory measures here involved could be a taking, and not impossible

that no taking occurred. The trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him. The mere existence of authority to regulate did not itself constitute the taking, and a regulation severely damaging an owner's expectations of realizing profit from his holdings, may not because of that necessarily be a taking either. We remand for determination of the taking question according to right principles, as it would be improper for us to constitute ourselves fact finders and weigh the evidence ourselves.

The act that allegedly constituted the taking, denial of a permit to discharge dredged or fill material into navigable waters and other waters of the United States, applied to but 98 acres out of a 1,560-acre tract, but the cross-appeal urges the whole 1,560 acres were taken because the action respecting 98 acres established a precedent that would govern the rest. This cross-appeal we deny. The award for taking 98 acres was $1,029,000 plus interest from a 1981 taking date. Anticipating that the cross-appeal might succeed, the trial court determined that the award for 1,560 acres would be $10,580,000 plus interest.

Statement of Facts

The plaintiff/appellee company, Florida Rock Industries, Inc. (Florida Rock), is a large-scale miner of limestone, which it extracts for conversion into aggregates for the construction industry. Such aggregates are basic material for a variety of concrete products. There are large deposits of limestone in South Florida, but they are rapidly becoming unavailable owing to the rapid growth of the densely populated area. Florida Rock purchased the

1,560 acre tract in question in 1972, paying $2,964.000. The sole purpose was to obtain its limestone deposits for extraction, and no other use, or sale, has ever been considered.

The tract is in the portion of Dade County, Florida, that lies west of the city limits of Miami. Krome Avenue borders its western side and the Tamiami Trail (Route 41) is one and one-half miles to the south. The built-up western residential suburbs of Miami are growing rapidly in its direction, and industrial activity is already visible from the tract itself. The ground is wet, frequently flooded by the state in its control of the water supply, and is part of the Everglades according to the map, but excluded by road, canal, and levee construction. The area is criss-crossed with state-owned canals. The surface is, according to the trial judge, of attractive appearance with variegated vegetation, a habitat of redwing blackbirds, swallows, snipe, American egrets and heron, as well as fish. Defunct vegetation, matted and rotting, lies above the limestone. They are wetlands that recharge the Biscayne aquifer and filter and purify the ground water, if left undisturbed.

It is conceded that before the 1972 amendments to the Clean Water Act, *supra,* Pub. L. No. 92-500, Florida Rock had the local zoning classification requisite to allow it to mine the limestone and needed no consent by the Federal Government. The amendments followed the acquisition and, according to the trial judge, Florida Rock need not have foreseen them. Actually, because of a slump in the construction industry, Florida Rock allowed the land to remain untouched, though it paid the taxes on

it, until 1978, and then commenced to mine. The Army engineers learned of this and stopped it with a cease and desist order. Florida Rock, on October 1, 1980, applied to the Army engineers for a section 404 (33 U.S.C. § 1344) permit to cover 98 acres only. This was estimated to suffice for three-years production, and the Army engineers refused to consider more. Florida Rock would have preferred a permit for the whole 1,560 acres, all of which it meant to mine eventually, but cut down the scope of the application to obtain consideration which would otherwise have been refused.

The Army engineers gave notice of the application to interested federal agencies such as the EPA, the National Park Service, and the Fish and Wildlife Service, to the state, and to Dade County. All urged objections focused primarily on the irremediable loss of wetland, and in the case of some, to water pollution in the form of temporary turbidity caused by the mode of mining proposed, the only feasible method Florida Rock knows of. This is to place a mechanism, called a "drag line," on solid ground, remove the muck overlay, dump it temporarily on the ground, remove the limestone thus made accessible with aid of blasting as necessary, dump some of the previously removed limestone or muck into the hole to make a solid foundation to which the "drag line" can be moved, and commence another phase. As the hole would be filled with water, dumping the fill into it would produce temporary pollution by turbidity which, however, would not be a menace to the drinking water. Dade County, if the permit were to be granted despite its recommendation, would require controls to confine the turbidity to 50 feet. It is clear from the administrative file that

the temporary pollution was of primarily legal importance as a source of federal jurisdiction, and the real concern was the threatened loss of valuable wetlands, which rendered a community service whose benefits extended far beyond Florida Rock's own property. The 98 acres, after removal of all limestone, would consist mostly of a deep lake or pond which, if environmentally harmless, was of no value either.

Dade County pointed out that Florida Rock would need various documents from it, including a Tree Removal Permit, and should make certain agreements with the county. The engineers, respecting their jurisdiction, pointed out that their definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(3) includes "wetlands * * * the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters."

Under date of October 2, 1980, after careful consideration, the district engineer determined that the permit would not be in the public interest, and denied it. His findings are our source of the facts stated above, which we take as given.

Proceedings Below

This lawsuit in the Claims Court followed. The "liability" and "damages" phases of the litigation were severed according to immemorial custom of that court and its predecessor, the Court of Claims. The plaintiff introduced evidence of its investment in the property, its intentions respecting use of it for mining with its anticipated profit therefrom, and argued that, if the property

could not be mined, it had no viable economic use whatever. The circumstances of the permit application and its denial were of course before the court. It appeared that since the permit denial there had been numerous inquiries about possible sale of the property by Florida Rock and one offer of $4,000 an acre. Florida Rock rejected everything, still wishing only to mine, and believing the property to be much more valuable than the offer, on the hypothesis, presumably, of either the restraints being lifted or the litigation resulting in the government's being held a taker. The value theory of Florida Rock was that the property before permit denial had a use value based on the owner's anticipated profits, and after the denial no "use value;" that fair market value subject to the restriction was a myth, potential buyers being made up of gullible persons, often foreigners, who would pay anything for acreage in South Florida, and more hard-eyed types who would also buy anything if the price was sufficiently trifling. Florida Rock offered, however, no testimony by real estate appraisers. It introduced testimony that the logic of denying the permit for 98 acres would preclude a permit for any other part of the tract.

The government produced a qualified real estate appraiser who testified that there was a fair market value remaining; he assigned $5,466,000 to the 1,560 acres in this case. The hypothetical willing buyers would not necessarily be fraud victims: he tried to disregard them though admitting they existed. The buyers would be aware that rock mining was effectively prohibited and that other development was likewise not then feasible. Their motivation would be a hope the regulation would change. Other government evidence was consistent. The Dade

County assessed value for tax purposes was $4,157,800, but this was contested.

Since the oral argument, we have received from appellant's counsel copies of a decision of the District Court of Appeals of Florida, Third District, styled *Florida Rock Industries, Inc. v. Franklin B. Bystrom, Dade County Property Appraiser, et al.*, case No. 85-1358. This material is on Lexis and Westlaw. Filed February 25, 1986, it reflects appellate and trial court affirmance of the action of the Dade County appraisers in assessing the 1,560 acres, the subject of the appeal before us, as of January 1, 1982, at a fair market value of $4,089,950. We do not consider it as evidence of any facts or as part of our record. We cite it, *infra*, as interesting and relevant case authority, though, of course, not a binding precedent in this court. Upon our remand, if this opinion is offered, the trial court will have to determine what use to make of it.

In an oral decision rendered from the bench, May 7, 1984, the court (Chief Judge Kozinski) determined that the permit denial promoted the public health and welfare; "we have to take it as given that this was a proper exercise of statutory and regulatory authority." Counsel assured him that there was no issue as to these matters in the case. "The Corps' denial of permit to rock mine the property advances a legitimate public purpose." The court responded: "If you were challenging that, you would be in District Court." He held that "the denial of the permit for the 98 acres was a taking because it left the plaintiff no reasonable economic uses for the property." He left open at that time whether the rest of the tract was

taken. In general he accepted the testimony of the plaintiff's economics expert that there was no other viable use. He confirmed this with what he saw when he viewed the property and noted defendant's own appraisal expert's admission there was no residential demand in the wetlands area. He addressed the defendant's evidence there was a market among knowledgeable investors who accepted the fact they would not be able to use the property for a while, saying that the law looks to the uses it can be put to, and a possible sale to one accepting a period of idleness, but hoping for a future change in conditions, is too speculative. He remarked that the idea a sucker was born every minute had been superseded by the idea one would sell swamp land in Florida to someone at almost any time.

As he had promised, but a year later, May 6, 1985, the trial judge followed up with a written opinion, 8 Cl. Ct. 160 (1985). As it is published, we need not set it forth in detail; it enlarges upon and elaborates the oral conclusions for the most part. It finds that as of the time of permit application, Florida Rock had all the necessary permits from state and local officials. One feature is new. The opinion, to refute defendant's argument that the denial stopped threatened harmful pollution which could be done without compensating the would-be polluter, undertakes to show that in fact the anticipation that the pollution would occur was unfounded, and finds as a fact that the proposed mine would not have polluted the water supply. He had previously determined that the denial was "a proper exercise of statutory and regulatory authority" which it could hardly have been if the engineers had not reasonably anticipated that some pollution would occur, enough to war-

rant the exercise of federal jurisdiction at least. This part of the opinion therefore reflects a drastic change of position.

The trial as to damages was conducted before May 6, 1985. On May 7, 1985, the judge reassembled counsel to hear him state his conclusions orally on the "damages" phase, on which he had now heard a large amount of new evidence. He ultimately concluded that only 98 acres were taken. He rejected the plaintiff's evidence based on the profit anticipated from sale of the limestone expected to be extracted from the property and instead deduced a value from actual sales of other property in the same neighborhood, similar in containing limestone deposits, but different in that extraction of the limestone was permitted. He concluded the award for 98 acres should be $1,029,000, *i.e.*, $10,500 an acre including damage to the remainder of the tract. If, on appeal, it should be held the whole 1,560 acres were taken, the award would be $10,580,000, he found. Interest would run from the taking date, October 2, 1980, at rates established in the court's order. Defendant's obligation to pay is conditioned upon tender by plaintiff of a quit claim deed in proper form for the 98 acres.

Discussion

Appellant/Defendant supports its appeal with three lines of argument, first, that the denial of the permit did not constitute a taking under the fifth amendment, second, that the court below engaged in an improper review of public interest factors, and third, that in establishment of the award the value of the property for rock mining should not be considered, *i.e.*, the property should be valued

as already subject to the permit denial asserted to constitute the taking. We address defendant's second issue first because, in our view, it raises a threshold question as to the jurisdiction of the Claims Court which we should define before we go further.

I

To repeat, the Claims Court reviewed the evidence and found as a fact that the proposed limestone mining would not pollute. This would appear to be an issue as to the jurisdiction of the Army engineers to regulate the activity in question. Under the authority relied on by them, 33 U.S.C. § 1344, permits can be required for discharge of pollutants, including rock and sand, *see* definition, 33 U.S.C. § 1362(6), into federal waters. It is clear from both the district engineer's decision denying the permit, and the government's brief and oral argument before us, that this is the sole basis in law for the Army engineers taking action. Absent pollution, as defined in the statute, the preservation or destruction of the instant wetlands would be a state or local issue only. The question of "public interest," as addressed in the district engineer's decision, is far broader and involves what he described as grave dangers to the environment over a wide area and not at all dependent on pollution. Should the plaintiff discover some means of removing the limestone without putting any rock or sand in government waters, the "public interest," as stated by the district engineer, would hardly be different at all if the wetlands were still eliminated. It was not contended the "pollutants" would be more than temporary turbidity, and the possible long-term harm by it would be minimal or nonexistent. One, therefore, must, in considering a document

such as the district engineer's decision in issue, distinguish very sharply between "jurisdiction" and "public interest" considerations. Clearly the challenge by the court below to the possibility of pollution has to do with the jurisdiction of the Army engineers to grant or withhold the permit in question, not to the broad range of "public interest" issues considered and applied by them when they deem they have jurisdiction. The finding by the trial court that there would be no pollution therefore attacks indirectly the right of the engineers to apply their conception as to the far weightier "public interest" issue.

Defendant further says, and we think it is indisputable, that the proper way to challenge the decision to grant or withhold the permit would be under the Administrative Procedures Act (APA), 5 U.S.C. § 702 and ff. If there was no pollution, even giving due weight to the contrary determination, as held in *Di Vosta Rentals, Inc. v. Lee,* 488 F.2d 674 (5th Cir. 1973), *cert. denied,* 416 U.S. 984 (1974), then the Army engineers had no statutory authority to act. The Tucker Act suit in the Claims Court is not, however, available to recover damages for unauthorized acts of government officials. *Armijo v. United States,* 663 F.2d 90 (Ct. Cl. 1981); *NBH Land Company v. United States,* 576 F.2d 317 (Ct. Cl. 1978). What is meant by authority in these premises is aptly illustrated by *Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327 (1922) where Army ordinance officers fired heavy coast defense guns over the plaintiff's hotel land. Justice Brandeis, dissenting, denied that the officers had authority to acquire an interest in hotel land, but Holmes, for the majority, held that whether they had authority to fire the guns was the decisive authority question. As to how authority is deter-

mined, *see also Armijo v. United States, supra,* and *Drakes Bay Land Co. v. United States,* 424 F.2d 574 (Ct. Cl. 1970). In the instant case, therefore, the district engineer did not need authority to acquire the 98 acres he is held below to have acquired on behalf of the United States, but he did need, or rather plaintiff needed him to have, authority to regulate the proposed mining as a *de jure* pollution, however minimal, of federal waters. In *Armijo v. United States,* 663 F.2d at 93, the Court of Claims said of regulatory taking cases justiciable under the Tucker Act "[i]n such cases the characteristic feature is the defendant's use of *rightful* property, contract, or regulatory rights to control and prevent exercise of ownership rights the defendant is unwilling to purchase and pay for." [Emphasis supplied.] In stating. therefore, "we have to take it for granted that this was a proper exercise of statutory and regulatory authority" the court recognized the limits of his role in a taking case, and in assuring him that "the Corps' denial of permit to rock mine the property advances a legitimate public purpose" counsel stipulated that such an issue was not before the court for adjudication. Logically, a decision that there was no threatened pollution does not support an award of $1,029,000. It would support either a dismissal of the complaint or a transfer of the case to a court having APA jurisdiction.

In *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982), the Court of Claims considered permit denial issues under the Clean Water Act, of the same general kind as here. The claimant, before its Court of Claims suit, had actually litigated its issues as to the validity of permit denial in an APA

suit, and a United States District Court had upheld the denial in all respects. In that context, the court held that the propriety of the permit withholding was "given" in the Tucker Act suit. We now hold that the election of a Tucker Act suit, without a previous test of validity issues under the APA, accomplishes the same result because of the necessity of conceding the engineers' authority to act. In defending, the government may deny the authority and in that way authority could become an issue in a Tucker Act taking case.

Apart from the foregoing, the unexplained switch in the trial court's position appears improper under the Law of the Case doctrine. *Yachts America, Inc. v. United States,* 779 F.2d 656, 659-60 (Fed. Cir. 1985); *Northern Helex Company v. United States,* 634 F.2d 557, 561-62 (Ct. Cl. 1980); *United States v. Turtle Mountain Band of Chippewa Indians,* 612 F.2d 517, 519-22 (Ct. Cl. 1979). He was identified, during his chief judgeship, with the practice of delivering orally from the bench opinions and fact findings in complex cases, saving time and conserving judge power. Often, as here, he undertook to answer questions so that his position would be thoroughly understood by counsel, and future proceedings in the case would be governed accordingly. The discussion here referred to occurred during such a question and answer period. The proceedings were recorded with care in the trial transcript. Between them and the retraction in the May 6, 1985, decision, the trial on damages occurred. We would not think of applying law of the case to mere colloquies between court and counsel, but this was more and different. We think that when an oral presentation by a judge

is given the prominence it enjoyed here, it, or the transcript of it, should have the same dignity as written findings and conclusions would have if they existed.

A good deal is said in this case about the apparent indifference of the Army engineers and their advising agencies in the United States Government to the loss of a valuable asset on the part of Florida Rock, one in which substantial capital was invested. Whether or not able counsel ultimately extricate the government from becoming an involuntary purchaser, it would seem officials who have studied all other aspects of their exercise of regulatory authority with the care the administrative record reveals, would give some thought to that. They appear to have believed it was enough to tell Florida Rock it could get its limestone elsewhere, disregarding the fact that in this tract it had invested its capital. Yet apparent official unwisdom does not make a constitutional violation. If one otherwise would have occurred here in the form of a taking without just compensation, it is cured by the Tucker Act and a more cautious construction of the Clean Water Act is not legally required. *Cf. United States v. Riverside Bayview-Homes, Inc.*, — U.S. —, 106 S. Ct. 455 (Dec. 4, 1985).

Accordingly, the inquiry whether and finding that the proposed activity would not pollute, was erroneous. It requires vacating and remanding because we cannot tell to what extent it influenced the holding that the denial of the permit constituted a taking.

II

We can, therefore, turn to the ultimate issue in this case, which is whether duly authorized and lawful acts of the Army engineers, denying a permit under 33 U.S.C. § 1344, constitute a taking and subject the United States to money liability in the Claims Court under the Tucker Act.

Defendant no longer argues, as it did below, if the regulation is lawful it cannot constitute a taking; in that event, it was once said it was not an exercise of the power of eminent domain but of the police power or some other different source of authority. This argument got its start in *Mugler v. Kansas,* 123 U.S. 623 (1887), much discussed below, in which the Kansas legislature, having determined that beer was an obnoxious and toxic beverage, prohibited its manufacture in the appellant's brewery, rendering the brewery, of course, of no value. While the court below deemed *Mugler's* precedential authority much abated, we may concede as a hypothetical, if Florida Rock produced on its tract a fluid as septic as Kansas then considered beer to be, and proposed to drain it into the Miami drinking water, this could be stopped without compensation. But the scope of permissible regulation has much increased since 1887 and it is no longer asserted that a regulation, by its very nature as a regulation, cannot be an exercise of eminent domain. The holding or plain implication of *United States v. Riverside Bayview-Homes, Inc., supra,* is that a regulation under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe. *See* statement of Justice White, 106 S. Ct. at 459 n.4. The

Clean Water Act in its present form, of course, goes far beyond the concerns of navigation, and such concerns are not implicated in this case, but in any event, the effect of *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) is that the old "navigation servitude," often used to excuse what looked suspiciously like takings, is no longer available for that duty in regulatory taking cases. Defendant, however, invoked the navigation servitude to excuse a regulation under the Clean Water Act that completely denied to the owner of a small island, any economic use of it, but the Court of Claims in *Laney v. United States,* 661 F.2d 145 (Ct. Cl. 1981) held that this could be a taking, and a summary judgment holding it could not be was denied. This court has held that a taking can occur by a valid regulation with no phyiscal invasion. *Skaw v. United States,* 740 F.2d 932 (Fed. Cir. 1984). Under these authorities, the question has got to be faced whether the impact of the regulation here involved was sufficiently severe under the facts, as undisputed or as found, and the unchallengeable legality in this proceeding of the regulatory act here involved, does not answer the question or even lead towards the answer. In *Laney,* too, the legality of the regulation under the Clean Water Act was conceded.

III

The Supreme Court has recently restated its standards for determining when a regulation constitutes a taking. It says:

> [W]e have eschewed the development of any set formula for identifying a "taking" * * * and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. * * * To aid in this

> determination, however, we have identified three factors which have "particular significance:" (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action."

Connolly v. Pension Benefit Guaranty Corp., 54 U.S.L.W. 4208, 3212 (U. S. Feb. 26, 1986)

The fifth amendment, as backed by the safety net of the Tucker Act, does not find a taking in a mere denial of the "highest and best use," *i.e.*, most profitable use, that would be available in the absence of regulation. It was so held in considering a Clean Water Act regulation in *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). The regulation may allowably have some adverse effect on the market value, as of course is almost inevitable if the most profitable use is prohibited. *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978). In cases of relatively recent date, *e.g.*, *Penn Central, supra*, the decision of *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) is often referred to as an instance of truly spectacular reduction in value, from $800,000 to $60,000, caused by the regulation, which was held valid. However, this was just an allegation, not a finding, and the case appears to belong to the period when it was held a valid "police power" regulation could not also be an exercise of eminent domain. The case generally considered to have broken with this analysis came later: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that case, Justice Brandeis' dissent cites *Mugler v. Kansas* and *Hadacheck v. Sebastian* and points out quite clearly how the

Court is breaking with its precedents. There is no fixed formula to determine how much diminution in market value is allowable without the fifth amendment coming into play. We are not cited to, nor have we found, cases comparing the owner's investment or basis with the market value subject to the regulation and applying any rule or formula with respect thereto, but we deem that a relevant consideration for exercise of a value judgment.

The court below relied on statements that a regulation was a taking if it "denies an owner economically viable use of his land" citing *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 296 (1981);* *Agins v. City of Tiburon*, 447 U.S. 255 (1980). It found as a fact that such denial occurred. This finding seems not clearly erroneous only if immediate use is meant. Defendant's suggestion of other immediate uses we deem obviously mere window dressing in light of its own expert witness' concession that a "willing buyer" subject to the regulation would have to be, and would be, one who expected to put the property to no immediate use. The position of the court was that if there was, under the regulation, no allowable and practicable immediate use, this established a taking regardless of the impact of the regulation on fair market value, even if it had no impact. Defendant said and says that a fair market value was real and its indications should govern.

This issue could not become a genuine controversy in most other regulatory contexts. In the special locale of the

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*The Court cited *Hodel* for a proposition other than the portion of *Hodel* relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S. Ct. 1005 (1985).

property involved, and special facts of this case, it does. Plaintiff offered no real estate appraisal expert to support its taking claim, but its economic expert, Dr. Nicholas, testified that "fair market value" subject to the regulation was a myth: the only buyers who would pay any substantial sum for the property were foreigners, unaware of the physical nature of the property and of the legal restrictions on its use, victims of fraud or self-deception. Defendant's expert, Mr. Cantwell, a qualified real estate dealer, testified that there was a fair market value subject to the regulation, as above set forth, the "willing buyers" of the conventional value formula being investors willing to forego immediate income in hope of long-term gain.

The locale makes the government theory more plausible than it might otherwise be. South Florida heas long enjoyed renown as not only a place where the gullible are fleeced, but also one where far-seeing investors realize fortunes. With the proximity of the huge and growing metropolis of Miami, expanding too in that specific direction, there can be no telling what future Miamians will want to use the instant tract for, still less what they will be willing and able to pay. Mineral land in the mountains or deserts may well be foreseen to have no possible future use except for production of minerals. This land is different and the trial judge recognized as much when he got to the "damage" phase for he found that the property would have substantial residual value, in view of its location, with all the minerals removed; thus a "willing buyer" would pay more than the mere value of the land as mineral land.

Of course, we take it for granted, as Mr. Cantwell did, that the "willing buyer" of the market value formula has got to be one who is correctly informed about the physical

character of the land, as well as legal restrictions on its use. He tried to disregard what those who came to be fleeced might pay.

IV

Thus, we have set up for adjudication a contest for employment as a test between immediate use value or non-value and fair market value. In *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), it is held that without evidence of a diminution in fair market value, a prohibition of mining on a tract cannot be held a taking. In *Florida Rock Industries, Inc. v. Bystrom, supra,* the Florida court holds that the lack of any immediate use of or for land does not exclude determination of its fair market value by analysis based on comparable sales of similarly restricted land. Slip op. at 8. Our trial court, as we read it, selected the immediate use value because it thought it prescribed by the language of the Supreme Court, read as saying that a denial of an *immediately* viable use is a taking, regardless of any fair market value analysis. No such analysis appears to have been before the Supreme Court when it gave such weight to such denial in the cases cited. We doubt very much whether the Court ever meant to say, or would have said, that a denial of any *immediately* viable use must be a taking even though it had no effect on the fair market value of the property. The further reason for the Claims Court's election was that it believed Dr. Nicholas that the only "willing buyers" were victims of deception, and disbelieved Mr. Cantwell that there were serious and well-informed "willing buyers."

We do not perceive any legal reason why a well-informed "willing buyer" might not bet that the prohibition

of rock mining, to protect the overlying wetlands, would some day be lifted. The statute would not have to change, only the perceptions of the Army engineers. One who remembers when wet lands were called swamps, when their draining or filling was deemed progress, and when their main environmental impact was in the production of noxious disease-bearing mosquitos, and who has observed their present status, will not be astonished if some day a mosquito bred in a swamp bites someone and infects him with malaria, and the old beliefs revive. Not only do we take as given, but we are impressed by, the wealth of scientific information that went into the district engineer's decision. He had light not available to our forebears. By the same token, our descendants may know things we do not even suspect. There is nothing so certain in life as that all certainties become uncertain, and some are replaced by their opposites. One who invests in land on this faith may be a speculator, but he is not on that account a gull.

Normally an appellate court accepts a trial court's election of whom to believe among conflicting testimony. Due to the different occupations of Dr. Nicholas and Mr. Cantwell, however, and their consequently different opportunities to perceive how the market operates, and who the "willing buyers" are, we think that the court's acceptance of Dr. Nicholas' testimony is clear error. We are left with a profound conviction that a mistake has been made. Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls. There may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain.

The trial court also invoked the rule that damages must not be speculative, by analogy as he was not ascertaining damages at that point. This rule, however, means that the court must not, itself, speculate, *i.e.*, guess, about potential end uses or markets when the speculation is so remote or improbable that one would not invest his money in it. It does not exclude consideration of a relevant market made up of investors who are real but are speculating in whole or major part. *Florida Rock Industries, Inc. v. Bystrom, supra.* Slip op. at 7. Anyone who buys mineral property is speculating to a large extent, and so is even to some extent one who buys "blue chip" securities. *See* Orgel *Valuation Under Eminent Domain* § 31 (2d ed. 1953).

Whether based on a belief that a use value analysis was required, or on a belief that the only serious bidders for the property subject to the restriction were fraud victims, or on a belief the other serious informed bidders were speculators, the exclusion from consideration of defendant's testimony as to the potential market was clear error or error, and highly prejudicial to appellant. We are of the opinion that Mr. Cantwell's testimony, if considered and believed, established the existence of a market in which Florida Rock could have disposed of the property and mitigated the severity of the regulatory action here involved, and the court should have considered such a possibility. Indeed, if there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government.

The court's methodology is objectionable for the further reason that, by dispensing with the fair market value

test in determining the occurrence of a taking, it makes the case improperly one to recover for frustration of business expectations. A taking is founded on the fact that Florida Rock is prevented from doing a profitable business in the extraction and sale of its limestone. Yet frustration in performance of even an existing contract is not a taking of contract rights, *Omnia Commercial Co. v. United States,* 261 U.S. 502 (1923) still less a hope of future profitable contracts. This case is cited and followed in *Connolly v. Pension Benefit Guaranty Corp., supra,* our latest Supreme Court pronouncement. *Cf. Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949) in which, in the case of a temporary taking some injury to business is allowed to be awarded, with a careful explanation that this would not be so of a permanent taking. If, therefore, the award here was for a temporary interruption of production, the rule might be different.

V

According to *Agins v. City of Tiburon,* 447 U.S. at 261, the question of identifying a regulatory taking involves a "weighing of private and public interests." What is called the "seminal decision" in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) is cited as illustrative. There the challenged zoning laws were held to bear "a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner." 447 U.S. at 261.

Conducting a similar weighing here, the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time. The pollution of the water, though the necessary hook for juris-

diction of the Army engineers, is not claimed in the district engineer's decision to be by itself very serious. The decrease in water quality due to turbidity will be "short term." "Water pollution does not appear to be a problem" at (water supply) wells adjacent to similar pits. No difference in water quality appears. Thus, when appellant characterizes the regulatory action as one to prevent pollution, it is really elevating form over substance. The concern of the district engineer is almost exclusively the continued existence of the wetland, not the temporary and moderate pollution incident to the occurrence of actual mining. It would be forensic semantics to characterize his decision as one against pollution, and the action has to be analyzed more carefully to weigh the private and public interests.

The Clean Water Act covers many types of pollution. We may assume, arguendo, that one who wanted to put toxic wastes in drinking water would encounter a balancing of public and private interests most unfavorable to his position and not likely to result in a compensation award. Denial of the permit frustrates him in doing harm. On the other hand, a moderate and *pro forma* polluter such as Florida Rock does no harm. Denial of the permit requires it to maintain at its own expense a facility, the wetlands, which by presently received wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaing such facility. This appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation for any loss actually incurred. The private interest, unless relieved by a Tucker Act award, sustains what may well be a permanent obligation to maintain property for public benefit, to carry the taxes and other

expenses, and not to receive business income from the property in return.

VI

Defendant says there was no taking because the 98 acres held taken are only a small part of a single tract of 1,560 acres, the rest not taken, and no restriction arising from the denial of the permit applies to them. Such a contention had dignity and was of decisive importance in the cases of *Deltona, supra,* and *Jentgen, supra,* but there the Army engineers considered the entire tracts and determined that portions thereof could be developed as proposed. Here the Army engineers considered only the 98 acres. As to the rest, it is and, for the immediate future, remains illegal to mine without a permit in the only fashion Florida Rock considers feasible. Florida Rock could apply seriatim for permits to allow mining on the rest, and inevitably, from the evidence and the findings, have them denied. We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality requiring us to deem that viewing the 1,560 acres as a whole, Florida Rock might in theory mine a lot of limestone, or perhaps market a housing development as appellant also would have us speculate.

The near certainty that the pot of water will boil is what justifies Florida Rock's cross-appeal in which it says, if it can't, as a practical or legal matter, mine on the rest of the property, the rest is taken, and the judgment should be modified to provide an award in the sum stated in the trial court's alternative finding. There are, however, answers to this. In the first place, if the Army engineers adverted to the possibility of making the government an involuntary

purchaser at all, they must have supposed the exposure would be much reduced by confining their determination to a test case of 98 acres. Such an interest in controlling the extent of exposure is entitled to some judicial respect. In the second place, since the 98 acres sufficed for Florida Rock's needs for three years, there is no likelihood that Florida Rock would, if allowed, mine over 98 acres in three years. Therefore, the frustration of any viable economic use, constituting the alleged taking, does not as to the excess commence until over three years have passed. If the taking legally occurs at the start of the three years, interest starts to run, which seems unfair when Florida Rock never expected to derive income from it. Thirdly, the real injury becomes more speculative as the time of intended development becomes more distant. Fourth, Florida Rock might have precipitated takings by filing a series of applications for 98-acre segments of the whole, but if the Army engineers refused to consider them, the refusal would be reviewable under the APA and not under the Tucker Act. We think it is very questionable whether a refusal to consider applications relating to remote periods would be deemed an abuse of discretion and, on the other hand, to hold the mere enactment of the statute a taking would be contrary to *Hodel, Agins,* and indeed, just about all the recent Supreme court authorities.

If the instant case, after the remand, still results in a substantial award against the government, the Army engineers probably would want to consider whether the continued protection of the 1,560 acres of wetlands was worth the damage to the public fisc. This right should be preserved to them.

VII

Appellant also attacks the decision below on the curious ground that the comparable sales, used as the trial court's base to compute the fair market value of the land it held taken, were sales of rockland near the Florida Rock site, but free of government restrictions on mining. The law, says appellant, requires land taken to be valued subject to all existing legal restrictions on its use. Thus, if the regulation constituting the taking reduced the value of land subject to it to zero, the very severity of the economic injury would relieve the taker of all but nominal fifth amendment liability. We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it.

CONCLUSION

We hold that the trial court committed an error of law in investigating and determining, notwithstanding the district engineer's finding that there was at least some *de jure* pollution to be anticipated from Florida Rock's project, in reality there was none. The apparent purpose was to sustain the assessment of taking liability for injury inflicted by regulation, but the alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all respects. The trial court also erred in assessing the severity of economic impact exclusively on the basis of a use value formula, refusing to consider any fair market value remaining in the land and realizable by the landowner. We think, however, the record reveals a substantial possibility that a taking should be held to have occurred under correct legal standards, so a remand is necessary. On remand, the

court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking. In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.

We affirm, however, the trial court's refusal to determine that land was taken in excess of the 98 acres as to which the permit was sought.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

IN THE UNITED STATES CLAIMS COURT

No. 266-82L

FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Fifth amendment taking; inverse condemnation; viable econmic use; residual market value; Federal Water Pollution Control Act Amendments of 1972; Clean Water Act; dredge and fill permit; navigational servitude.

(Filed May 6, 1985)

John A. DeVault, III, with whom were C. Warren Tripp, Jr. and Bedell, Dittmar, DeVault, Pillans & Gentry, Jacksonville, Florida, for plaintiff.

Fred R. Disheroon, with whom were George B. Henderson and Assistant Attorney General F. Henry Habicht, II, Washington, D.C., for defendant.

OPINION

KOZINSKI, Chief Judge.

This case presents the question of whether denial of a dredge and fill permit by the U.S. Army Corps of Engineers pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1982), constitutes a taking of plaintiff's property, where the property can be put to no viable economic use without such a permit.

BACKGROUND

On September 21, 1972, plaintiff bought about two and a half square miles (1560 acres) of unimproved wetlands in

Dade County, Florida, several miles inland from the city of Miami. Plaintiff's property is situated above a limestone formation that is approximately 50 feet deep. The limestone is suitable for mining and tests indicate that the property would yield some 100,000 tons of usable rock per acre.[1]

Plaintiff is in the business of manufacturing and selling crushed stone and aggregate for use in construction. It bought the property for the specific purpose of mining the limestone from which these materials are produced. Plaintiff considered the property particularly well suited to its purposes because of the proximity to Miami and the fact that a spur of the Seaboard Coast Line Railroad servicing a nearby quarry could be extended to provide a convenient and economical means of transporting the limestone to other parts of the state.

Rock mining is common in the part of Dade County where plaintiff's property is located. The normal method of extracting limestone is by use of a dragline, a large mechanical device that looks somewhat like a crane. The dragline is placed near one corner of the property on a pad (an area covered with crushed rock or other filler to raise it above water level). The peat layer covering the limestone is then removed from the area adjacent to the pad, exposing the rock. The rock is loosened through blasting and then scooped out by the dragline. After some processing, the rock is placed on trucks or box cars for shipping. When the dragline finishes removing all of the rock within its

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[1] The court makes no finding as to the amount of limestone on the property or its value. These issues may be resolved through further proceedings in the damages portion of this case.

reach, it is moved to a new location. Blasting and excavation begins anew until the cycle is completed and the dragline must be moved again.

Excavation continues in cycles in a single direction leaving behind a trench some 50 feet deep and filled with water. When the dragline reaches the end of the excavation area, it reverses course and digging continues immediately adjacent to the trench just completed. With each sweep of the dragline, the trench becomes wider; it eventually develops into a deep body of standing water. This body of water is incapable of sustaining the rich variety of plant and animal life found in the displaced wetlands.

When plaintiff bought the property, it had all of the necessary state and local permits or waivers to operate a limestone quarry; there were no applicable federal statutes or regulations. Approximately one month later, Congress passed the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (FWPCA). This legislation gave the Army Corps of Engineers jurisdiction to issue permits for discharging certain materials into the "waters of the United States." In 1977 the Corps issued regulations taking the position that this phrase extends the Corps' jurisdiction to wetlands.

The removal of limestone does not, per se, implicate the FWPCA or require a permit from the Corps. Nor is the destruction of the wildlife habitat associated with limestone removal, in and of itself, a basis for exercise of Corps jurisdiction over plaintiff's activities. The Corps' sole basis for jurisdiction is the fact that, as part of the mining process, plaintiff must temporarily deposit the excavated material onto wetlands immediately adjacent to

the excavation. This occurs in two ways. First, some of the excavated material is used to construct the pad or platform on which the dragline sits. Second, after material is removed from the excavation pit, it is normally deposited on the ground for drying and processing before it can be shipped.

Because of a serious downturn in the southern Florida building industry in the mid-1970s, plaintiff did not begin mining until July of 1978. At that time, plaintiff was unaware of the Corps' jurisdiction or the need to obtain a federal permit. The Corps discovered plaintiff's activities and issued a cease and desist order on September 7, 1978. Plaintiff complied and began preparing a permit application. As a condition for considering the application, the Corps required that plaintiff restore the property to its pre-excavation condition.

On October 1, 1979, plaintiff submitted to the Corps an application for a permit covering a 98 acre portion of the property. Plaintiff, in fact, intended to excavate all of its property. However, the Corps had advised prospective applicants that it would not consider applications that covered more than about three years of excavation. Plaintiff estimated that excavation of the property covered by its application would take about that long, while it might well take many decades to excavate the entire tract.

On October 2, 1980, the Corps denied plaintiff's permit application. Plaintiff did not seek judicial review of that decision. Instead, it brought suit in our predecessor court claiming that denial of the permit constituted a taking of its property because there are no economically viable uses (other than rock mining) to which the land may be put.

Key Findings of Fact

Trial on the question of liability was held in Florida from January 3 through January 11, 1984. After briefing and argument, the court made a number of oral findings of fact, the following of which are crucial to analysis of the issues presented:

(1) At the time the Corps issued its cease and desist order, plaintiff had all the necessary state permits or waivers, as well as the economic resources, to mine limestone on its property. Limestone mining would have afforded plaintiff substantial economic gain.

(2) Under the current state of technology, it is impossible to profitably mine limestone on plaintiff's property without a Corps of Engineers dredge and fill permit. *See also* p. 5 n.4 *infra.*

(3) Rock mining is the only viable economic use to which the property can be put. Some other uses (such as hunting and fishing) would not yield sufficient income to cover even real estate taxes. Because of its location, the property is not suitable for residential construction or commercial activity. In any case, construction connected with such alternative uses would require the issuance of a Corps permit. Such uses would alter the character of the land and surrounding environment much more drastically than limestone mining; it is unthinkable that the Corps would issue such a permit in light of its denial of plaintiff's application. *See also* p. 24 n.23 *Infra.*[2]

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[2] Additional findings of fact are set forth on the record of the May 7, and June 12, 1984, hearings and, where appropriate, in the body of this opinion.

Discussion

Plaintiff claims a regulatory taking. Specifically, it argues that the United States has so seriously interfered with its right to use and enjoy its property as to render the property economically useless.

The concept of a regulatory taking is not new in the law. More than half a century ago, the Supreme Court held that a state statute that effectively deprived the plaintiff of the right to mine its land constituted a taking compensable under the fifth amendment. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414-15 (1922). Over the years, the Supreme Court, the Court of Claims and the Court of Appeals for the Federal Circuit have consistently upheld the principle that excessive regulation may constitute a taking. *Ruckelshaus v. Monsanto Co.,* — U.S. —, —, 104 S. Ct. 2862, 2874-75 (1984); *Kirby Forest Industries v. United States,* — U.S. —, —, 104 S. Ct. 2187, 2196 (1984); *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Kaiser Aetna v. United States,* 444 U.S. 164, 174-75 (1979); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n.36 (1978); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958); *Skaw v. United States,* 740 F.2d 932, 939 (Fed. Cir. 1984); *Yuba Goldfields, Inc. v. United States,* 723 F.2d 884, 887-88 (Fed. Cir. 1983); *Benenson v. United States,* 212 Ct. Cl. 375, 392 (1977); *Pete v. United States,* 209 Ct. Cl. 270,

297 (1976); *see also Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1557 (Fed. Cir. 1985).[3]

The Supreme Court has enunciated the following test as to whether a regulatory taking has occurred: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' " *Hodel*, 452 U.S. at 295-96 (quoting *Agins*, 447 U.S. at 260).

The court has found that denial of the permit by the Corps of Engineers made it impossible to profitably mine rock on plaintiff's property. To paraphrase Mr. Justice Holmes, "[w]hat makes the right to mine [rock] valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain [rock] has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal*, 260 U.S. at 414.[4] In addition, the court has found that there

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[3] In *Chicago, Rock Island & Pacific Ry. v. United States*, 284 U.S. 80 (1931), the Court noted that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Id.* at 96, *quoted with approval in Kaiser Aetna*, 444 U.S. at 174 n.8.

[4] Restriction of the right to extract minerals in a particular manner may not work a taking if there are alternative methods to profitably mine the property. *See Whitney Benefits, Inc. v. United States*, 752 F.2d at 1562. (Markey, C.J., dissenting). Here, defendant has admitted that it is aware of no method for removing the limestone from plaintiff's property without obtaining a Corps permit to fill wetlands. Hearing Transcript of Aug. 25, 1983, at 15-16. Edward L. Baker, President of Florida Rock, testified that there is no economically viable method of mining limestone that can be accomplished without some filling of the property. Trial Transcript of Jan. 3, 1984, at 127. The court is persuaded by Mr. Baker's testimony and finds that there is no profitable method of extracting limestone from plaintiff's property that would not require a Corps permit.

are no other economically viable uses to which the property can be put. Denial of the permit therefore has deprived plaintiff of all economically viable use of its land. Applying the standard enunciated by the Supreme Court in *Hodel* and other cases leads to the conclusion that there has been a regulatory taking and that plaintiff is entitled to compensation.

Defendant has launched a volley of arguments as to why plaintiff should nevertheless be denied any recovery. Many of these arguments are ingenious and forcefully presented. If sustained, however, they would tie a claim for regulatory taking into a Gordian knot no plaintiff could ever hope to unravel. In considering defendant's arguments, therefore, the court is mindful of the Supreme Court's admonition that takings cases must not be resolved by mechanical application of formulae but through reason in light of common sense and experience. *Kaiser Aetna v. United States,* 444 U.S. at 175;[5] *see also Monsanto,* — U.S. at —, 104 S. Ct. at 2874; *Goldblatt,* 369 U.S. at 594; *Penn Central Transportation Co.,* 438 U.S. at 124; *Whitney Benefits, Inc.,* 752 F.2d at 1558; *Althaus v. United States,* Nos. 443-82L & 352-83L, slip op. at 7 (Cl. Ct. Apr. 4, 1985).

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[5] The follow passage from *Kaiser Aetna* exemplifies the Court's unwillingness to be lured toward an absurd result by an elegant argument:

> There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment . . . . But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.

444 U.S. at 177.

1. *Plaintiff's Residual Rights in the Property*

Defendant argues that plaintiff has not been deprived of its property because it retains valuable incidents of ownership: the right to use the land in its current condition; to restrict or permit access to it by others; to sell, lease or give it away. in whole or in part. According to defendant, plaintiff has been deprived of merely one in the "bundle of sticks" comprising its rights in the property, and such a partial deprivation does not constitute a taking. Defendant relies on such cases as *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *Andrus v. Allard,* 444 U.S. 51 (1979); *Deltona Corp. v. United States,* 228 Ct. Cl. 476 (1981); and *Jentgen v. United States,* 228 Ct. Cl. 527 (1981).

Defendant's argument proves far too much. A taking through regulation invariably leaves the property owner certain incidents of ownership that, on their face, appear to be significant. For example, in *Pennsylvania Coal* the property owner was denied the right to mine coal where doing so would cause the subsidence of any dwelling. The owner retained numerous other rights: to sell, lease or give away its interest in the property; to visit the mine; to exclude all intruders and trespassers. Similarly, in *Benenson,* where plaintiffs were deprived of the right to replace the Willard Hotel with a modern office building, or to make any other significant exterior structural changes, the court noted that "plaintiffs have complete freedom to alter the interior of the building for uses other than a hotel, and [defendant] has not prohibited the sale or other use of the property." 212 Ct. Cl. at 390. In *Pete,* barge owners were prohibited from conducting commercial operations on Basswood Lake, Minnesota. Plaintiffs nevertheless retained the right to exclude others from using or occupying the

barges; to sell or lease them; to modify, disassemble, or destroy them; and to move them to another location. In each of these cases, the court recognized that such rights as remained to the property owner, important though they may have seemed in theory, retained little or no economic value as a result of the government's action. *See also Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1596 (1984) (taking found even though landowners still had the right to live in their houses).

In cases involving regulatory takings, the court must examine the substance, rather than the legal trappings, of what is left as a result of the government's regulatory action. If that which is left to the property owner is rendered meaningless by that which is taken, compensation is due.

Here, the court has found that denial of the Corps permit deprived plaintiff of the only economically viable use of its property—rock mining.[6] Under such circumstances,

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[6] Defendant has suggested that plaintiff's holding the land for "long term investment," in the hope that it will eventually become available for productive use, is itself a viable economic activity. Of course, the same could have been said of the owners of the mine in *Pennsylvania Coal*, of the Willard Hotel in *Benenson* and of the unimproved land in *Althaus*. If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking.

There may be situations where regulatory restrictions have no practical effect because the prohibited use is not economically feasible. This is not such a case. Here, plaintiff had begun to mine the property and abandoned its activities only when

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plaintiff's remaining ownership rights, such as the right to exclude others from the property, are meaningless; plaintiff has no reason to exclude others if it cannot itself put the property to productive use. Under such circumstances, plaintiff's residual rights are hollow and cannot defeat its claim for just compensation.

2. *Residual Market Value*

Defendant next argues that plaintiff cannot claim a taking of its property because its land has not been rendered entirely worthless. Defendant presented evidence that there is a market for plaintiff's land and relies upon cases holding that a mere diminution in the value of property is not a taking. *Agins,* 447 U.S. at 262-63; *Andrus,* 444 U.S. at 66; *Penn Central Transportation Co.,* 438 U.S. at 131; *Deltona Corp.,* 228 Ct. Cl. at 491-92; *Jentgen,* 228 Ct. Cl. at 532.

In the cases cited by defendant the property affected by the government's action continued to have significant value not merely because it could be sold for some positive price in the market, but in the more meaningful sense that it continued to be available for productive economic activity. For example, the zoning ordinance in *Agins* drastically reduced the number of dwellings that could be built on plaintiff's land. However, a significant amount of con-

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served with a cease and desist order by the Corps of Engineers. Plaintiff then applied for a dredge and fill permit, disclosing every intention of conducting mining activities. Under these circumstances, relegating plaintiff to passively holding the land in the hope that the regulatory climate may someday change cannot be deemed the type of viable economic use that will defeat a claim for a taking under the fifth amendment.

struction was in fact permitted; this constituted a profitable economic use. In *Penn Central* the Court noted that "[t]he restrictions imposed . . . not only permit[ted] reasonable beneficial use of the landmark site but also afford[ed] appellants opportunities further to enhance not only the Terminal site proper but also other properties." 438 U.S. at 138 (footnote omitted). In contrast, plaintiff here is left without *any* economically viable use of its property and is afforded no "transfer rights" or other accommodation of its interest.

Common sense suggests that regulatory action will never entirely eliminate the market value of the real property it affects. Land, but its nature, is timeless; government policy, indeed any particular government entity, is inherently transitory. There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a fifth amendment taking even though the property obviously continued to have market value. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Benenson v. United States*, 212 Ct. Cl. 375 (1977); *Pete v. United States*, 209 Ct. Cl. 270 (1976); *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), *cert. denied* 104 S. Ct. 1596 (1984); *Annicelli v. Town of South Kingstown*, — R.I. —, 463 A.2d 133 (1983); *Bartlett v. Zoning Commission*, 161 Conn. 24, 282 A.2d 907 (1971); *Dooley v. Zoning Commission*, 151 Conn. 304, 197

A.2d 770 (1964); *State v. Johnson,* 265 A.2d 711 (Me. 1970); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 193 A.2d 232 (1963).

Here, the court finds that the market for plaintiffs land is based on speculation, much of it fueled by unscrupulous promoters. Southern Florida real estate attracts much investment capital, particularly from abroad. Land is sold to unwary, distant buyers on the premise that it is, or can be rendered. suitable for development. The State of Florida has recognized this as a serious problem and has taken measures to curb the practice, apparently without complete success. The existence of a market for plaintiff's property, despite what the court has found to be its uselessness for all productive activity, is based upon speculators' expectations that they will be able to pass the property on to hapless investors who do not understand the nature and scope of the restrictions on its use, or can be persuaded that the restrictions are transitory or can be circumvented.[7]

It is well established that speculative value may not be taken into account for purposes of determining compensation in condemnation proceedings. *United States v. 117,-763.00 Acres of Land,* 410 F. Supp. 628, 631-32 (S.D. Cal.), *aff'd sub nom. United States v. Shewfelt Investment Co.,*

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[7] Potential buyers would require much sophistication to understand the full scope of the restrictions on the use of plaintiff's land. The FWPCA does not directly prohibit construction in wetlands, but merely requires a permit therefor. Buyers might well believe that a permit is readily obtainable. In reality, if a permit was denied plaintiff for rock mining, there is little possibility that a permit would be issued for other construction activities (such as apartment houses) which alter the character of the land and surrounding environment much more drastically.

570 F.2d 290 (9th Cir. 1977); *accord Olson v. United States*, 292 U.S. 246, 257 (1934); *United States v. 158.24 Acres of Land*, 696 F.2d 559, 562 (8th Cir. 1982); *United States v. 620.00 Acres of Land*, 101 F. Supp. 686, 690 (W.D. Ark. 1952). In *117,763.00 Acres of Land*, the government sought to condemn a leasehold of desert property for use as an artillery range. The property owners argued that the fair market value ought to be determined by reference to prices paid by speculators for nearby property. At the urging of the United States, the court rejected this argument noting that the prices paid by speculators did not rest upon the "appraisal of the land in terms of its uses and a forecast of what the needs of a growing and shifting population for those uses will be," but upon the fact that "each speculator buys with the thought that he can sell to another speculator at a higher price . . . the whole thing [being] a game of wits with someone at the end of the trading chain losing." 410 F. Supp. at 632.

It seems eminently sensible, as well as entirely fair, to apply the same rule in inverse condemnation cases. This court has done so recently in *Althaus v. United States*, Nos. 443-82L & 352-83L (Cl. Ct. April 4, 1985). The author of this opinion cannot improve on Judge Mayer's terse dismissal of defendant's identical argument in *Althaus:* "[T]he court rejects the idea that the fifth amendment can be avoided by forcing citizens to sell their property to speculators at a fraction of its value." Slip op. at 9.

3. *Rock Mining as an Element of Value*

Perhaps defendant's most ingenious argument is that the court must ignore limestone mining—indeed any activity requiring a federal permit—in determining whether

plaintiff has been dprived of all viable economic use of its property. Under defendant's theory, any use that is subject to governmental approval is dependent upon the consent of the government for its value and so defendant may not be charged with loss arising from the prohibition. Defendant relies upon a series of direct condemnation cases holding that the United States need not compensate a property owner for value derived from uses that the government was entitled to prevent through a power other than eminent domain. *United States v. Fuller,* 409 U.S. 488 (1973); *United States v. Rands,* 389 U.S. 121 (1967); *United States v. Twin City Power Co.,* 350 U.S. 222 (1956); *United States v. Cors,* 337 U.S. 325 (1949).

Defendant's argument badly distorts the nature and function of government in a free society where the right to own and enjoy property is a fundamental aspect of personal liberty, not a privilege dependent upon the whim of the sovereign. *See Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972);[8] *see also Fuentes v. Shevin,* 407 U.S. 67, 81 (1972); *Shelley v. Kraemer,* 334 U.S. 1, 10 (1948). Under defendant's theory, the government would never be required to pay compensation for denial of a permit or, indeed, for any regulatory activity that severely limits or entirely destroys the economic uses to which property may be put. Since practically all economic activity has now been held to be the proper subject of regulation by the federal government, defendant's argument would effectively free the United States of all constitutional constraints in the

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[8] In *Lynch* the Court noted that "the dichotomy between personal liberties and property rights is a false one . . . . Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." 405 U.S. at 552.

area of economic regulation. This the court will not do. As Professor Epstein recently noted: "Our guiding principle should derive from our Lockean tradition—a tradition that speaks about justice and natural rights .... When government wishes to encroach on those rights in order to discharge its collective functions, it must give all the individuals on whom it imposes its obligations a fair equivalent in exchange." Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 Cato J. 711, 716 (1985).

The cases defendant cites do not, in fact, support its conclusion. In *Fuller*, the property owner sought compensation for value derived from permits entitling him to graze his cattle on federal lands adjacent to the condemned land. The Court held that this element of value was not compensable because the Secretary of the Interior was authorized to withdraw the permits at will, thereby destroying the value created by their existence. 409 U.S. at 493. In *Rands* and *Twin City Power Co.*, the Court denied compensation for losses resulting from an exercise of the "navigational servitude" of the United States. *Rands*, 389 U.S. at 126; *Twin City Power Co.*, 350 U.S. at 228. In each of these cases, the action of the United States was taken in its proprietary, rather than its sovereign, capacity. The rights in question belonged to the United States and were only enjoyed by the property owners subject to revocation.[9] In our case, the right to mine the property belongs entirely to

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[9] *Cors* has no relation to this case. It stands for the proposition that the government need not compensate the owner for value created by the very use to which the government plans to put the condemned property. 337 U.S. at 333. Here, the value destroyed by denial of the permit was not created by the government; it is due entirely to market forces extraneous to the Corps' permitting process.

plaintiff. The United States has no proprietary interest in plaintiff's land and therefore no right to prohibit rock mining except through exercise of its regulatory power. This is plainly not the situation contemplated in *Fuller, Rands* and *Twin City Power Co.*, and the United States therefore cannot escape its responsibility to pay compensation under the fifth amendment.[10]

4. *Taking and the Police Power*

Defendant also raises arguments to the effect that the Corps' denial of a permit cannot constitute a taking because it merely prohibits an activity "found by Congress to be detrimental to the public welfare;" because plaintiff's proposed rock mining operation would cause pollution; and because defendant is trying to protect "valuable habitat and food chain resources[,] . . . values that society has his-

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[10] Defendant might have been misled by language in cases such as *Fuller* to the effect that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government . . . might have destroyed under the exercise of governmental authority *other than the power of eminent domain.*" 409 U.S. at 492 (emphasis added). This language does not, in fact, support defendant's position. Destruction of some property rights may occur incident to a valid exercise of regulatory authority, but where the destruction is excessive—as in this case—it is deemed to have been an exercise of the power of eminent domain as well. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) & authorities cited therein; *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769 (1978) ("if [government] regulation is unreasonable or arbitrary relative to private property rights, the law of eminent domain applies") (citing *Goldblatt*, 369 U.S. at 594, and *Pennsylvania Coal*, 260 U.S. at 413-14); *Althaus v. United States*, Nos. 443-82L & 352-83L, slip op. at 6 (Cl. Ct. Apr. 4, 1985) (government actions resulted in de facto exercise of power of eminent domain). Even by its own terms, then, the statement quoted from *Fuller* has no application to this case.

torically enjoyed and may properly protect." These arguments are considered in turn.

a. *Activity Detrimental to the Public Welfare*

Defendant's broadest argument is that compensation need never be paid where an activity is prohibited that has been "found by Congress to be detrimental to the public welfare." The court rejects this argument out of hand. Exercise of the police power, by definition, promotes the public good. It follows that any use prohibited under the police power is contrary to the public welfare. In essence, then, defendant is arguing that an exercise of the police power can never result in a taking, regardless of how innocuous the private activity or how severely the governmental action diminishes the use and enjoyment of private property. The compensation clause of the fifth amendment would be read out of existence if government could define away private property rights by pronouncing their exercise as contrary to the public welfare.

The Supreme Court may have suggested the position urged by defendant a century ago in *Mugler v. Kansas,* 123 U.S. 623 (1887). *Mugler* established the "noxious use" doctrine, the principle that a valid exercise of the police power that merely protects the "health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69. At issue in *Mugler* was an amendment to the Kansas constitution and implementing legislation that prohibited the manufacture and sale of intoxicating liquors. Defendants, owners of breweries in operation prior to the passage of the amendment, claimed that they had been deprived of a property interest by the state without just com-

pensation in violation of the fourteenth amendment. The Court concluded that "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." *Id.* at 669.

The law has progressed significantly since *Mugler*. In *Pennsylvania Coal* the Court repudiated the proposition that an exercise of the police power can never constitute a taking, making what is perhaps the strongest statement yet to the contrary:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

260 U.S. at 415.

Cases since *Pennsylvania Coal* have consistently rejected the *Mugler* analysis. In *Goldblatt,* plaintiff argued that a civic ordinance preventing it from mining gravel and sand on its land, as it had in the past, was a taking in violation of the fifth amendment. The Court concluded that there had been no taking as the ordinance was a valid exer-

cise of the police power. *Mugler* was quoted, but the Court specifically disowned the concept that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594; *see Barbian v. Panagis*, 694 F.2d 476, 485 n.7 (7th Cir. 1982) ("[t]hough the Supreme Court has held in [*Mugler*] that an exercise of the police power may never amount to a taking, the Court has retreated from the principle in more recent decisions") (citing *San Diego Gas & Electric Co.*, *Agins*, and *Pennsylvania Coal*). As this court recently recognized, "[w]hen the police power ventured into such areas as zoning and conservation . . . this polestar [the *Mugler* analysis] disappeared over the horizon." *Morton Thiokol, Inc. v. United States*, 4 Cl. Ct. 625, 630 (1984).[11]

Mugler has also come under scholarly attack. In 1964 Professor Sax noted that "[t]he noxious use, cause-of-the-harm test is simply insufficient for the task" of determin-

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[11] Speaking for an apparent majority of the Court, Mr. Justice Brennan noted as follows in *San Diego Gas & Electric Co.*:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

450 U.S. at 652 (footnote omitted), *quoted in Jentgen*, 228 Ct. Cl. at 531.

ing when compensation must be paid under the fifth amendment. *Sax, Takings and the Police Power,* 74 Yale L.J. 36, 50 (1964). Professor Michelman notes that while "the notion that all property is held subject to an implied police-power servitude seems at one time to have been entertained by the Supreme Court [in *Mugler*]," this theory met its Waterloo in *Pennsylvania Coal.* Michelman, *Property as a Constitutional Right,* 38 Wash. & Lee L. Rev. 1097, 1108 (1981); *see also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1199 n.72 (1967) ("the accuracy, and the ingenuousness, of the Court's gratuitous word judgment [in *Mugler*] were probably questionable then, and surely have been ridiculed by history").

In short, *Mugler* was one narrow[12] attempt by the Supreme Court to deal with the problem of competing uses of land in an industrialized society. Developments over the past century have significantly weakened its precedential value. It is no longer a correct statement of the law as to the general relationship between the police power and the takings clause of the fifth amendment.

b. *Prohibition of Pollution*

Defendant suggests that *Mugler* continues to have force in the circumstances of this case because the proposed use of the property would cause pollution. Defendant ar-

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[12] In *Berkowitz v. United States,* 340 F.2d 168 (1st Cir. 1965), the court distinguished *Mugler,* noting that, "[t]he medicines which courts administer when liquor is involved have their own peculiar emotional or, conceivably, rational elements, and are not suitable prescriptions for the generality of cases." *Id.* at 172.

gues that there is no right to use one's property so as to harm others and government may therefore prohibit such uses without paying compensation.

It is conceivable that government could prohibit all viable economic uses of property without paying compensation if all such uses, in fact, cause pollution. However, simple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the fifth amendment. "[M]ere labels" of this sort afford "no talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Government may not circumvent the takings clause by defining an acitvity as pollution and rendering its noxious by fiat. Pollution, as that term is normally understood, involves serious adverse physical effects upon the health, welfare or property of others. To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes such harm.

i. Defendant first argues that plaintiff's activity constitutes pollution because it is defined as such by statute. In the FWPCA, Congress defined as pollution the dumping of "dredged and fill" material into the nation's waters. After rock is scooped out of the excavation pit during the mining process, it is placed on the adjacent wetlands. This rock falls under the definition of "dredged and fill" material and its deposit on wetlands therefore constitutes pollution under the Act's definition. The evidence presented at trial, however, establishes that placing rock into the water after it has just been scooped up has no material effect upon the health, welfare or property of others. Under these circumstances, the statutory definition of pollution does not advance the analysis or automatically insulate the

government's action from the takings clause of the fifth amendment.

ii. Defendant next argues that plaintiff's proposed mining operation constitutes pollution because it would cause contamination of the water supply. To understand this argument one must turn to certain facts disclosed at trial. The limestone that plaintiff intends to mine is part of the Biscayne Aquifer, a vast deposit of porous rock underlying southern Florida. The aquifer has the capacity to store large quantites of fresh water within its pores. Huge wellfields are dug into the aquifer from which water is extracted for human consumption. One such wellfield, known as the Northwest wellfield, is located approximately four miles northeast of plaintiff's property. Water extraction depletes the aquifer, as does the flow of water out of the aquifer toward the Atlantic Ocean. The aquifer is replenished by rainfall and through a network of canals that flow south from Lake Okeechobee in south central Florida. The canals, many of which run along public highways, are cut deep into the limestone so that the water they carry can be absorbed.

Defendant's principal contention is that the peat or muck layer in the marsh filters out various chemicals (such as phosphorus), heavy metals (such as zinc and iron) and pesticides (such as DDT) that otherwise would enter the water from the atmosphere. The peat is situated immediately above the limestone rock at the bottom of the marsh; it is generally covered by about a foot of water and is inhabited by plant and animal life.

At trial, defendant sought to establish that removal of the peat layer through rock mining would expose the

aquifer to contamination. Defendant's evidence on this point was not persuasive, however, and the court finds that the peat layer does not, in fact, serve as a filter for contaminants. The most striking shortcoming of the evidence defendant presented concerning the function of the peat layer was the absence of direct empirical data. The most obvious—and effective—way to test whether the peat layer acts as a filter would have been to analyze the water above and below it. If the peat acts as a filter, the water in the aquifer below would contain fewer contaminants than the water in the marsh above. Defendant's expert admitted that such an analysis would have been effective in measuring the filtering capacity of the peat layer but gave no reason for rejecting this methodology. Nor did the expert report that he had performed any laboratory experiments to test the filtering qualities of the peat.

Instead of relying on such obvious, simple and apparently foolproof techniques, defendant's expert based his opinion entirely on the fact that certain contaminant substances were found in greater concentrations in the peat layer than in the water immediately above it. This fact does not, however, establish that the peat is currently acting as a filter. In the first place, the witness did not explain why filtration would be the only explanation for the observed higher concentrations of chemicals in the peat layer. The court cannot ignore the possibility that this higher level of contaminants in the peat may be the result of chemical or biological processes other than filtration.

More significantly, the witness admitted that even if the peat possessed filtering properties, it could not continue to act as a filter for any length of time unless there were

some cleansing mechanism that removed the contaminants from the peat on a periodic basis.[13] Defendant's witness admitted that the alleged filtering action had been in process for many millenia, easily enough time to saturate the peat layer. Despite intense questioning on this point, however, the witness was unable to give a satisfactory explanation of how the peat might be purified periodically.[14] Absent such a purification mechanism, the peat would, indeed, show high concentrations of contaminants as observed by defendant's expert, but would have reached saturation and be useless in filtering out further contaminants. On this record, then, the court must reject defendant's assertion that the peat acts as a filter and that its removal during rock mining would eliminate important natural protections against atmospheric contamination of the water supply.

Defendant's expert also suggested that rock mining adversely affects water quality in another way. As described earlier, after the rock has been excavated, there remains a large, water-filled pool where the limestone has

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[13] This is so because filters become saturated with the substances they absorb and lose their effectiveness. The need to periodically clean or change filters in swimming pools, fish tanks and air conditioning systems are illustrations of this principle.

[14] The witness suggested that animals might feed on vegetation growing on the property (ingesting some of these chemicals) then leave the property and die elsewhere. However, as the witness recognized, this process also works in reverse, with animals feeding elsewhere and coming to die on the property, thereby depositing whatever chemicals are trapped in their bodies. The same is true of other transport mechanisms suggested by the witness: peat fires that would cause the chemicals to become airborne and fall to the ground elsewhere; detritis that would flow onto the property as quickly as it passed out; and aquatic insect larvae that mature in one location within the peat and die elsewhere.

been removed. The pool is generally over 50 feet deep and can support little or no aquatic life. Sunlight can penetrate only about 20 feet beneath the surface of the pool. Without light, there is no photosynthesis; without photosynthesis, no oxygen is produced. This means that the bottom 30 feet of the pool are anaerobic and much colder than the water nearer the surface. The expert also testified that the differences in water temperature lead to stratification, which means that the water near the surface will not readily mix with the water below. Under those conditions, certain heavy metals are observed in much higher concentrations near the bottom of the pool than in the warmer, oxygenated water near the surface.[15] The witness concluded that rock mining harms water quality by creating deep water pools that cause the release of metals into the water.

The witness' testimony on this issue overlooks a number of obvious considerations. In the first place, there is no reason to assume that the anaerobic, low-temperature conditions that prevail 50 feet below the surface in open water rock pits do not also exist at the same depth within the aquifer. Indeed, while sunlight penetrates to 20 feet below the surface of a lake, it presumably does not penetrate through the peat layer at all and certainly does not pass into the rock. It seems to follow that the water within the aquifer is subject to greater anaerobic conditions and

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[15] Defendant's expert was somewhat laconic in explaining what causes these metals to appear. As best the court can gather from the testimony, these metals are also present in warmer, oxygenated water although they may be combined with organic compounds. The absence of organic materials, together with the colder temperatures near the bottom of the pool, apparently causes these metals to be released or precipitated so that they can be separately observed and measured.

cooler temperatures than the water in a rock pit. Moreover, the peat layer and the aquifer itself would totally prevent mixing of the surface water with the water within the aquifer. This could lead to greater temperature stratification than in a rock pit where warm, oxygenated surface water may mix at least to a limited extent with the water below.

It is conceivable that something about the chemical or physical composition of the aquifer nullifies the forces that are at work within the rock pit. Howevér, nothing in the testimony of the witness suggested that to be the case. Indeed, the witness limited his analysis to a totally irrelevant comparison between the conditions at the bottom of the rock pit, dozens of feet underwater, with those in the marsh, only a few inches below the surface. Surprisingly, the witness took no water samples from within the aquifer and made no comparison between heavy metal concentrations in the rock pit and in the equifer at equivalent depths.

There is yet another problem with the expert witness' analysis. The data he presented consisted of one set of readings taken at an unidentified location within a rock pit. Even overlooking the patent unsuitability of a single sampling for any serious scientific inquiry, the reported measurement did not take into account the dynamic nature of the water within the rock pit. Defendant's own experts testified that, as the wellfields operate, the surrounding water table is lowered, causing water within the aquifer to flow towards the pumping stations. Moreover, fresh water within the aquifer naturally flows toward the ocean. At any point within the aquifer, therefore, there would be a measurable horizontal water flow in one or more directions.

Depending upon the speed with which the water flowed, and the location of the measurement site, the water samples taken might or might not have reflected the chemical and physical conditions within the pool itself. For example, if the samples were taken near the upstream edge of the pool. the water retrieved could well have been recently released from the aquifer. Only by repeated, consistent readings at various locations could the witness have been reasonably sure that the samples taken were of water that had been in the pool long enough to reflect the physical and chemical conditions there.

Finally, even if one were to conclude that the water in the rock pit is different in chemical composition from that elsewhere within the aquifer, defendant's expert failed to explain how this has a detrimental effect upon the quality of the drinking water. It must be remembered that, in this portion of its case, defendant was not suggesting that the rock pit admits greater quantities of heavy metals into the water supply. *But see* pp. 15-16 *supra*. The point of the expert's analysis was that heavy metals (which presumably already exist within the water) are precipitated or released as separate, identifiable compounds. *See* p. 16 & n.15 *supra*. The witness failed to explain, however, why heavy metals in suspension are any more unsafe for human consumption than the same heavy metals in solution or combined with organic compounds.[16]

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[16] It is worth noting that the "scientific" evidence presented was based on observations and measurements taken shortly before trial. It was not available to, and therefore was not considered by, the Corps in rendering its decision whether to issue the permit. The administrative record prepared by the Corps

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Defendant's final argument that rock mining causes contamination is based upon the proposition that rock pits make it easier for people to contaminate the water supply by facilitating access to the water within the aquifer. There are a number of difficulties with defendant's argument on this point as well. First, the evidence at trial establishes that rock pits do not in fact increase the likelihood of contamination from toxic pollutants or other waste materials. If such substances are dumped anywhere on the wetlands covering the aquifer, they will seep through the peat layer and permeate the rock. This process might well be slower than if the contaminants were dumped in a rock pit but, according to undisputed testimony, they would eventually reach the aquifer in any event.

Second, there are already many places where the peat layer has been removed to allow direct access to the aquifer from the surface. The most notable of these are the canals used to transport water from Lake Okeechobee. The canals, many of which run along roads and highways, are cut deep into the aquifer so the flowing water can come into direct contact with the permeable rock. There is such a canal across the highway from plaintiff's property, readily accessible to the public. By contrast, rock quarries are fenced and closely guarded. It is preposterous to suggest

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reveals no evidence of this sort. While the decisional document, issued October 2, 1980, notes that the peat layer serves a filtration function, the basis for this conclusion is not given. There is no discussion at all of the alleged higher concentrations of heavy metals within open rock pits.

that someone inclined to dump contaminants would eschew the easy access and seclusion of miles of canals and thousands of acres of wetlands, and sneak into a quarry to drop them into a rock pit.

If there is a legitimate concern that contaminants might be dumped into the aquifer through a rock pit, there are methods of preventing that harm that are far less draconian than a total prohibition of rock mining on plaintiff's property. For example, issuance of the permit could well have been conditioned on providing adequate security and fencing around the pit, or on limiting future development of the property to avoid public access.

iii. Aside from the weakness of defendant's case, its position is further undermined by other evidence that strongly suggests rock mining has no negative effect on water quality. Most impressive is the fact that the area in the vicinity of plaintiff's property is littered with rock quarries, most of them much closer to the wellfields than plaintiff's property. These quarries have been in existence for many, many years, some predating the wellfields. Yet the local authorities do not hesitate to operate the wellfields, and, indeed, established them in that area despite the pervasiveness of rock mining. Furthermore, a study conducted regarding the effect of rock mining on water quality concluded that rock mining did not have an adverse impact on water quality. Even the Corps' own environmental assessment found "no definitive pattern of groundwater quality degradation or significant change in water quality" of wells in proximity to rock pits. U.S. Army Corps of Engineers. *Excavation and Use of Limestone In*

South Florida-Technical Report and Environmental Investigation, § 1.5.6, at 1-65 (Jul. 21, 1982).[17]

Finally, plaintiff's proposed rock quarry was situated so that it would be highly unlikely that the quality of the water drawn from the wellfields would be affected. A Dade County ordinance protects the portion of the Biscayne Aquifer from which the wellfields draw their water. The ordinance is premised on a study showing the rate at which water will travel towards the wellfields in response to pumping. The study marks an outside "cone of influence," representing the farthest point in the aquifer from which water reaches the wellfields. Permits are required for development within the cone of influence. A number of rock quarries are within that cone of influence, some quite close to the wellfields. Plaintiff's proposed rock mine would have fallen entirely outside that cone of influence. Thus, water from its rockpit would never, for all practical purposes, have reached the wellfields.

On the basis of the evidence presented, the court finds that plaintiff's proposed rock mine would not have resulted in pollution of the water supply.

c. *Destruction of "Habitat & Food Chain Resources"*

Defendant raises a separate argument that the proposed project would eliminate a substantial amount of wetlands and with them "valuable habitat and food chain re-

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[17] At the same time, the assessment concludes that rock mines result in a increase in water *quantity* available for consumption. *Excavation and Use of Limestone in South Florida*, § 1.5.6, at 1-61. This is because a pool can hold more water than can a portion of the aquifer of equal volume where much of the space is taken up by the rock itself.

sources." The evidence in fact suggests that the rock pit would seriously and permanently disrupt the wetlands on plaintiff's property. Life forms in the marsh, such as fish and amphibians on which birds feed, would diminish. Moreover, the life cycle in the marsh produces detritis, miniscule particles of organic matter that result from the decay of plant and animal remains. Surface water flow moves detritis off the property, presumably to serve as nutrients elsewhere.[18] In addition, the court notes that the swamp is a place of great natural beauty, teeming with an astonishing variety of life forms. By contrast, rock pits are unsightly and barren.

Defendant argues that denial of the permit cannot constitute a taking because the public was entitled to continued enjoyment of the environmental and aesthetic values the property now generates. In defendant's view, since plaintiff had no right to deprive the public of these values by disturbing the wetland environment, it is not entitled to compensation for being prohibited from doing so.

i. Defendant's argument stands our traditional concepts of private property rights on their head. It is impossible to use one's property in a society without having some impact, positive or adverse, on others. Nevertheless, the concept of property rights presupposes that private parties have wide latitude as to how they will use what they own. This principle has its limits, of course. For example, gov-

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[18] Defendant proffered evidence that the flow of detritis from plaintiff's property makes its way to the Biscayne estuary some 12 miles away. The court excluded this evidence on the basis of surprise. In light of the court's substantive ruling, admission of this evidence would not have affected the outcome of the case in any event.

ernment may prohibit uses that cause the release of substances harmful to others, such as air or water pollution. *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-29 (6th Cir. 1974). It may also restrict property uses to promote the general welfare, so long as the owner is left with some viable economic use. *Agins*, 447 U.S. at 260; *Penn Central Transportation Co.*, 438 U.S. at 138 n.36; *Goldblatt*, 369 U.S. at 594; *Deltona Corp.*, 228 Ct. Cl. at 490; *Jentgen*, 228 Ct. Cl. at 533-34; *Althaus*, slip op. at 13. But to accept defendant's argument that government may gratuitously freeze all development because the public has a vested right to continued enjoyment of the environmental, aesthetic or similar values generated by the property in its current state, would render the concept of private property meaningless.[19] *Cf. Pennsylvania Coal Co.*, 260 U.S. at 415 (unlimited approval by the courts of restrictions on the use of property may cause private property to disappear).

Federal and state courts alike have been vigilant in protecting private parties from governmental action that forces them to maintain their property in an undeveloped condition. *Althaus* provides an excellent illustration. There, a series of plaintiffs claimed that the government had restricted use and development of their property. As to some plaintiffs (those whose land was already developed), the court ruled that there was no taking because

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[19] Defendant's argument was implicitly rejected by the Court of Claims in *Benenson*, 212 Ct. Cl. at 392. The public's interest in continued enjoyment of the aesthetic, historical and cultural values embodied in the Willard Hotel was not a sufficient basis for denying plaintiffs compensation where this interest manifested itself in a total prohibition of any economically viable use of the property.

the owners continued to have reasonable use of their property. *Althaus,* slip op. at 13-14. However, as to those owners who were forced to maintain their property in an undeveloped state, the court held that there was a taking because plaintiffs were denied "the ordinary and essential uses and rights of private ownership." *Id.* at 11; *see also Drakes Bay Land Co. v. United States,* 191 Ct. Cl. 389 (1970) (taking found where landowner was prevented from developing its land by government officials bent on incorporating it into the Point Reyes National Seashore).

Contrary to defendant's assertion, courts do not view the public's interest in environmental and aesthetic values as a servitude upon all private property, but as a public benefit that is widely shared and therefore must be paid for by all. This concept was expressed well by the Supreme Court of Maine in *State v. Johnson,* 265 A.2d 711 (Me. 1970), a case much like ours. There, as here, the landowner was denied a permit to develop wetlands. The court found a taking without just compensation, reasoning that:

> [T]he area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of state-wide concern. The benefits from its preservation . . . are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.

265 A.2d at 716.[20] *See also Annicelli v. Town of South*

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[20] *State v. Johnson,* like some of the other decisions cited, was interpreting a state's constitution. The court's reasoning is nonetheless persuasive, particularly since the pertinent state constitutional provision is identical to the federal one. Indeed, the court quoted Mr. Justice Holmes' opinion in *Pennsylvania Coal.*

Kingstown, — R.I. —, 463 A.2d 133 (1983) (ordinance designed to preserve beaches in a natural state found to work a taking); *Bartlett v. Zoning Commission,* 161 Conn. 24, 282 A.2d 907 (1971) (ordinance that forbade owner from filling mash held a taking where objective was to avoid the destruction of wetlands); *Dooley v. Town Plan & Zoning Commission,* 151 Conn. 304, 197 A.2d 770 (1964) ("[w]here most of the value of a person's property has to be sacrificed so that community welfare may be served . . . the occasion is appropriate for the exercise of eminent domain"); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 193 A.2d 232 (1963) (taking found where the effect of regulation was to preserve land in its natural state to act as a flood basin); *Hager v. Zoning Commission,* 261 S.W.2d 619 (Ky. 1953) (zoning regulation preserving land as a "ponding area" found to work a taking).

ii. Where government entirely prohibits development of property for purposes of maintaining environmental values or to serve other police power interests, it frequently provides a remedy to compensate the owner, at least partially, for his loss. Such a remedy generally saves the provision from constitutional infirmity. For example, in *Penn Central,* a city ordinance prohibited the proposed development of Grand Central Station because the project would have destroyed the terminal as a historic landmark. The ordinance, however, provided the owners would have "transfer rights" to develop other property. In upholding the validity of the ordinance, the Court noted that the property owners' interests had been considered and a reasonable attempt had been made to accommodate them. *Penn Central Transportation Co.,* 438 U.S. at 137-38; *see*

also Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 246-47 (1983) (no taking where government sought to accommodate all relevant interests and its "action[s] resulted in both direct and incidental benefits to plaintiff"), *aff'd mem.*, No. 84-860 (Fed. Cir. Feb. 13, 1985).

Perhaps the most apposite examples of this practice are federal statutes dealing with conservation in national parks and wilderness areas. Under the Wilderness Act, Congress sought to preserve certain areas of the United States in a natural state. The Secretary of Agriculture is directed to assure adequate access to private land surrounded by these wilderness areas, or to exchange the land for federal land of equal value. 16 U.S.C. § 1134 (1982). Similarly, the National Trails System Act provides for a system of exchange and/or monetary compensation for the acquisition of private land within a national scenic or historic trail right-of-way. 16 U.S.C. § 1246(f) (1982). The Wild and Scenic Rivers Act also allows the Secretaries of Agriculture and the Interior to acquire private land within a national wild and scenic river system by the exchange of equivalent land and/or monetary compensation. 16 U.S.C. § 1277(d) (1982).[21]

Most interesting, though, is the Water Bank Act. Under this act, Congress recognized that "it is in the public

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[21] In this regard, the Court of Appeals for the Federal Circuit has recently noted as follows:

> Where the question is whether a regulation not meant to take an interest in land is so onerous as to effect a taking by imputation, and with no provision for money compensation, the availability of substitution rights may be important in determining whether the regulation is something the landowner can live with without unfairness.

Whitney Benefits, Inc., 752 F.2d at 1557.

interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources." 16 U.S.C. § 1301 (1982). The Secretary of Agriculture is authorized to enter into agreements with land owners to effectuate the purposes of this Act. These agreements are to provide for annual payments at rates the Secretary has determined to be fair and reasonable to compensate the landowner for conserving the wetlands on his property. 16 U.S.C. § 1304 (1982). Defendant is no doubt correct in arguing that the nation has an interest in preserving the environmental and aesthetic values represented by wetlands. The question is: How are these benefits to be paid for? As Mr. Justice Brennan recognized in *San Diego Gas & Electric Co.*, "[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation." 450 U.S. at 652. However, Congress recognized in the Water Bank Act that the public may enjoy the benefits of undisturbed wetlands only by paying compensation to the property owner who is thereby deprived of the use of his land.[22]

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[22] This expression of congressional policy is not without significance in determining whether the government's action here amounts to a taking. In *Drakes Bay Land Co.*, involving the creation of the Point Reyes National Seashore in California, the court found a taking, specifically noting that "Congress enacted [the Point Reyes National Seashore Act] requiring and expecting that an equitable acquisition program would be effected." 191 Ct. Cl. at 404. In *Althaus*, this court recently found a taking where land was kept in its natural state in anticipation of its acquisition for a national park, noting: "Congress reflected its appreciation of the fifth amendment by requiring that an equitable acquisition program be used with reasonable promptness at Voyageurs [National Park]." *Althaus*, slip op. at 10.

What these regulatory schemes have in common is that in each case the property owner's interest has been considered and accommodated, not sacrificed on the altar of the public interest. By contrast, the regulatory scheme pursuant to which plaintiff's land was rendered economically useless provides for no accommodation whatsoever of plaintiff's right to use and enjoy its property. In determining whether to issue plaintiff a permit, the Corps did not so much as consider plaintiff's obvious interest. The permitting process, which lasted 12 months, involved a thorough study of the *public* impact of the proposed rock mining project. Comments were requested and received from numerous federal, state and local agencies engaged in protection of environmental resources. The decisional document, issued October 2, 1980, reviewed these comments and then considered 14 separate "Public Interest Factors," which included such matters as the effect of the proposed project on fish and wildlife, aesthetics and the economy. The project was found to have many adverse effects. The only beneficial effects the Corps found were enhancement of the economy, expansion of job opportunities and stimulation of competition. The Corps minimized the significance of these positive factors by noting that rock mining permits had been issued to some of plaintiff's competitors, this in the Corps' view providing sufficient alternative sources of limestone, as well as sufficient employment and competition.[23] That denial of the permit would visit grave

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[23] The permits approved by the Corps were for rock mining in an area east of the Dade-Broward levee, a local landmark. The Corps denied plaintiff's permit pursuant to what the court finds to have been a deliberate, but unannounced, policy of

(Continued on following page)

economic harm upon plaintiff, harm that is only aggravated by issuance of mining permits to its competitors, was not so much as mentioned in the Corps' memorandum of decision.

The court suggests no wrongdoing or dereliction of duty in the Corps' failure to consider plaintiff's private loss in its decision on whether to issue a permit. Plaintiff has conceded the validity of the permitting process and does not claim that the Corps considered impermissible factors or failed to consider factors it should have. It is therefore deemed established that the Corps scrupulously followed the regulatory scheme in its consideration and denial of plaintiff's application. The process itself, however, is geared to take into account only the public's interests in how the property will be used; the owner's private interest is ignored. The difficulty arises because the property in question does not belong to the public but to plaintiff. It may be perfectly appropriate to consider only public interest factors when determining the use of public land. However, when government treats private land as if it were its own, ignoring the interest of the property owner and rendering the property economically useless, it has worked a taking and, under our constitution, compensation is due.

(Continued from previous page)

"zoning" the area west of the Dade-Broward levee, north of the Tamiami Trial and east and south of Krome Avenue as undisturbed wetlands where no significant development would be permitted.

5. *The Power of the Federal Government Over Navigable Waterways*

Defendant's final argument is that denial of the permit is not a compensable taking because it is an exercise of the federal government's power to regulate the nation's waterways. In defendant's view, Congress may prohibit, without compensation, all "private activities which pollute, degrade, or diminish the waters of the United States and their alternate resources."

This argument adds nothing to the analysis in light of the issues already resolved by the court. The fact that plaintiff's proposed mining operation would involve wetlands does not by some peculiar alchemy protect the government from the fifth amendment's takings clause any more than the other incantations it has invoked. As the Supreme Court noted in *Kaiser Aetna,* "[r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce." 444 U.S. at 173. Even when the property in question is a navigable waterway, the United States may be required to pay compensation where it unduly interferes with the property owner's right to use and enjoy its property. *Id.* at 175-79 & n. 10. This reasoning applies, a fortiori, where plaintiff's property is concededly not a navigable waterway, and where the Corps' action was not taken to improve navigation.[24] To the extent denial of the permit is otherwise deemed a taking, it will not

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[24] In denying plaintiff's permit application, the Corps noted that there were no applicable navigation concerns. Finding of Fact and Environmental Assessment on Permit Application 79P-1334, at 7 (Oct. 2, 1980).

be converted into something else because water happens to be involved.

Conclusion

Denial of the dredge and fill permit by the Corps of Engineers constituted a taking of plaintiff's property for which compensation is due. The taking occurred on October 2, 1980, the date the permit was denied. The amount of compensation to which plaintiff is entitled will be determined in further proceedings.

May 6, 1985

/s/ Alex Kozinski

jrh:mls:jrh

IN THE UNITED STATES CLAIMS COURT

No. 266-82 L

FLORIDA ROCK INDUSTRIES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER ON VALUATION

In accordance with the findings announced following the trial on valuation which commenced April 22, 1985, and concluded May 7, 1985, the Court finds as follows:

1. As of the date of taking, October 2, 1980, the value of the entire 1,560-acre parcel owned by plaintiff Florida Rock Industries, Inc., is:

1,240 acres at $7,500 per acre	$ 9,300,000
320 acres at $4,000 per acre	1,280,000
Total	$10,580,000

2. As of the date of taking, October 2, 1980, the value of the 98-acre parcel owned by plaintiff Florida Rock Industries, Inc., for which a dredge and fill permit was denied by the U. S. Army Corps of Engineers, is:

98 acres at $10,500 per acre $1,029,000

3. In addition, plaintiff is entitled to recover interest on the value of the parcel ultimately determined to have been taken from the date of taking until payment by the government, computed at the rates established by the

Contract Disputes Act, Pub.L.No. 92-41, 85 Stat. 97. *See Foster v. United States,* 3 Cl.Ct. 738, 745 (1983); *Cloverport Sand & Gravel Co., Inc. v. United States,* 6 Cl. Ct. 178 (1984). The applicable rates thus far established are:

July-Dec. 1980	10½ percent
Jan.-June 1981	14⅝ percent
July-Dec. 1981	14⅞ percent
Jan.-June 1982	14¾ percent
July-Dec. 1982	15½ percent
Jan.-June 1983	11¼ percent
July-Dec. 1983	11½ percent
Jan.-June 1984	12⅜ percent
July-Dec. 1984	14⅜ percent
Jan.-June 1985	12⅛ percent

4. Within thirty days of the date of this Order, plaintiff shall submit its application for attorneys' fees and expenses. The plaintiff's application shall be supported by itemized documents detailing the actual time devoted to this case, the standard hourly billing rates of all individuals who worked on the case, any amounts paid to experts, and any other expenses for which reimbursement is claimed. The defendant shall file its response within thirty days of the filing date of plaintiff's application. Plaintiff may file a reply to defendant's response not later than 14 days after the filing of defendant's response.

May 17, 1985

/s/ Alex Kozinski
Chief Judge

Supreme Court, U.S.
FILED
NOV 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-465

In the Supreme Court of the United States

OCTOBER TERM, 1986

FLORIDA ROCK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly remanded this case to the trial court to consider current market value in determining whether a taking occurred when the Corps of Engineers denied petitioner's application for a permit, under Section 404 of the Clean Water Act, to discharge pollutants into the waters of the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-30) is reported at 791 F.2d 893. The opinion of the Claims Court on liability (Pet. App. 31-71) is reported at 8 Cl. Ct. 160, and the Claims Court's opinion on valuation (Pet. App. 72-73) is not reported.[1]

[1] The transcripts of two oral opinions issued by the Claims Court (C.A. App. 9-55, 87-120) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1986. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1). The petition for a writ of certiorari was filed on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." Section 101(a), 33 U.S.C. 1251(a). Under Section 301(a) of the Act, 33 U.S.C. 1311(a), discharges of pollutants into those "navigable waters" are illegal, unless conditions found in other specified sections of the Act are satisfied. One of those specified sections is Section 404 of the Act, 33 U.S.C. (& Supp. II) 1344, which allows the Secretary of the Army—acting through the Chief of Engineers—to issue permits for the discharge of dredged or fill materials into the "navigable waters." See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985).

2. Petitioner, Florida Rock Industries, Inc., is a large-scale miner of limestone, which it extracts for use in the construction industry (Pet. App. 4).[2] In 1972, Florida Rock paid $2,964,000 to acquire three

[2] As the opinions below describe (Pet. App. 6-7, 32-33), the process of extracting limestone creates some turbulence in the water as limestone and muck are dredged up and temporarily redeposited in the water (*id.* at 6). After the limestone has been removed, a deep body of standing water remains, which is "incapable of sustaining the rich variety of plant and animal life found in the" wetlands (*id.* at 33).

tracts, aggregating 1,560 acres, in southern Florida (*id.* at 5). The site, which is frequently flooded by the State as a water control measure (*ibid.*), serves as the home of a variety of birds, fish and vegetation. It consists of wetlands which replenish the Biscayne Aquifer (which is the sole source of drinking water for Dade County) and, in their natural state, filter and purify the ground water flowing through the aquifer (*ibid.*; see 44 Fed. Reg. 58797 (1979)).

Because of economic conditions, it was not until 1978 that petitioner commenced mining. Petitioner did not, however, request or obtain a permit from the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. II) 1344 (Pet. App. 6, 34).[3] When the Corps learned of the mining operation, it ordered petitioner to cease and desist. In 1980, petitioner applied to the Corps for a permit to mine only 98 acres of the property, an estimated three years' production (Pet. App. 6).[4]

The Corps of Engineers gave notice of the application to a variety of federal agencies, including the Environmental Protection Agency, the National Park Service, and the Fish and Wildlife Service. It also

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[3] Until 1975, the Corps of Engineers had taken the position that nontidal wetlands which were not navigable in fact were not subject to the Clean Water Act. In response to litigation, the Corps of Engineers changed its regulations in 1975, with relatively minor additional changes in 1977 and 1982. See *United States* v. *Riverside Bayview Homes, Inc.*, slip op. 1-2.

[4] At that time, the Corps requested limestone mining firms to submit applications only for three-year permits until an environmental impact statement could be completed on the effects of limestone mining in Dade County. Petitioner did not challenge the Corps' request, and limited its application to three years' production.

notified the State and Dade County. All of these agencies and instrumentalities objected, focusing primarily on the loss of wetlands "whose benefits extended far beyond Florida Rock's own property" (Pet. App. 6, 7).[5] On October 2, 1980, the district engineer denied petitioner's application, determining that the requested permit would not be in the public interest (Pet. App. 7).

3. Petitioner did not seek judicial review of the Corps' administrative determination. Instead, petitioner brought the present action in the United States Claims Court, contending that the permit denial constituted a taking of its entire 1,560 acre property and seeking the payment of just compensation.

In the liability phase of its bifurcated proceedings, the court held that the denial of the permit constituted a taking of the 98-acre tract, but not of the remainder of the 1,560-acres. The Court found that rock mining was the only economically viable use of the property (Pet. App. 34), and that the proposed rock mine "would not * * * result[] in pollution of the water supply" (*id.* at 61).[6]

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[5] Dade County stated that petitioner would have to obtain (but had not yet applied for) permits from the County before any mining could commence and that if it received such an application, the County would require petitioner to establish controls to limit to 50 feet the turbidity caused by limestone mining (Pet. App. 6).

[6] In its oral opinion following trial on May 7, 1984, the Claims Court stated that such pollution could occur and ruled that the Corps' finding of fact to that effect must be accepted. See Pet. App. 9; C.A. App. 34-35. In its written opinion on the same issue filed one year later, the trial court nonetheless rejected the Corps' findings of fact. The court stated that the

Following a trial on valuation, the court concluded that just compensation for the 98 acres amounted to $1,029,000 (Pet. App. 72-73).[7]

4. Both parties appealed. The United States Court of Appeals for the Federal Circuit vacated the Claims Court's finding that a taking of property had occurred and remanded the case for further consideration because (Pet. App. 4) "[t]he trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him."[8]

The court of appeals specified two errors in the trial court's analysis. First, the Claims Court should not have considered the question whether petitioner's mining activity would cause pollution (Pet. App. 12-16). The court of appeals stated (*id.* at 12-14) that in the absence of pollution the Corps of Engineers would have had no jurisdiction under the Clean Water Act and the denial of petitioner's application would in that instance be an unauthorized action by the Corps that would not constitute a taking of property by the government. Thus, if petitioner wished to challenge the regulatory authority of the Corps, the proper means would be a suit in district court

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proposed rock mine "would not have resulted in pollution of the water supply" (Pet. App. 61).

[7] Although it had previously rejected petitioner's taking claim with respect to the remainder of the 1,560 acre tract, the court nevertheless determined that the aggregate value of the entire parcel was $10,580,000. The court made that determination in order to avoid the need for a retrial in the event the court of appeals reversed the ruling that only 98 acres had been taken.

[8] The court of appeals affirmed the trial court's determination that, in any event, no more than 98 acres had been taken (Pet. App. 27-28, 30).

under the Administrative Procedure Act (Pet. App. 13-15). In the view of the court of appeals, when a party brings a Tucker Act suit it necessarily concedes the authority for the government's actions (Pet. App. 15).

The court of appeals found that the Claims Court also erred in failing to consider the effect of the alleged taking on the fair market value of the property as one of the factors in deciding whether a taking had occurred (Pet. App. 20).[9] Relying on this

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[9] The court of appeals also addressed the trial court's determination that there was no genuine market value for the property. Petitioner's witness, Dr. Nichols, who was not a real estate appraisal expert, testified that some of the persons willing to purchase the land were foreigners or possible victims of fraud or self-deception (Pet. App. 21). The government's real estate witness, Mr. Cantwell, a qualified real estate appraiser, stated that a conventional market did exist, including persons willing to forgo immediate income in hope of long-term gain (*ibid.*). He testified about several comparable sales in the immediate vicinity of petitioner's property, and stated that several offers had been made for petitioner's property at prices ranging up to $4,000 per acre (Pet. App. 8). (Petitioner's original purchase price of $2,964,000 for the 1,560 acres averages $1,900 per acre (see Pet. App. 5).)

The court of appeals ruled that the trial court's acceptance of Dr. Nichols' testimony was error (Pet. App. 23):

> We are left with a profound conviction that a mistake has been made. Since the tract was not listed for sale, the $4,000 per acre offer, the frequent inquiries, and the assessed value, must have reflected interest of knowledgeable people, not foreigners or gulls. There may be a question what knowledgeable buyers would have paid, but that they would have paid some substantial figure seems certain.

The appellate court stated that Mr. Cantwell's testimony, if considered and believed, established the existence of a market

Court's decision in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13, the court of appeals stated that the factors pertinent to the ad hoc factual inquiry whether governmental action constitutes a taking include the economic impact of the regulations on the claimant, the extent to which the regulations interfere with distinct, investment-backed expectations, and the character of the government action (Pet. App. 19).

ARGUMENT

The court of appeals did not decide whether the facts of this case constitute a taking. Rather, it ruled only that the trial court's decision was incorrect because it did not take into account the market value of the property as subject to the Corps' regulations, and because the lower court disregarded the Corps' factual findings, specifically the finding that the proposed mining activities would cause pollution. There is no reason for this Court to consider the interlocutory decision below, which does not conflict with any decision of this Court or of any other court of appeals.

1. As petitioner recognizes (Pet. 12-13), this Court's decisions establish an ad hoc approach to deciding whether regulations affecting property constitute a taking. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *United States* v. *Riverside Bayview Homes, Inc.*, slip op. 4-5; *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 12-13.

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in which Florida Rock could have disposed of the property and thereby mitigated the severity of the regulatory action. The court ruled that the existence of that market might well allow a sufficient remaining use of the property to justify a ruling that no taking had occurred (Pet. App. 24).

This Court's decision in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), is particularly instructive. In that case a corporation owned a 38-acre tract of land on which it had mined sand and gravel for many years, eventually down to the water table. In 1958, the town amended its ordinances to prohibit any excavation below the water table, and the owner claimed a constitutional taking. This Court rejected the claim because no evidence had been introduced concerning the value of the land subject to the regulation. The Court stated (369 U.S. at 594 (footnote omitted; emphasis added)):

> There is no set formula to determine where regulation ends and taking begins. *Although a comparison of values before and after is relevant* * * * it is by no means conclusive * * *. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.

Consistent with this Court's holding in *Goldblatt*, the court below remanded for the trial court to consider the market value of the land subject to Corps' regulation.

2. Petitioner also contends (Pet. 14-15) that the court of appeals erred in establishing "an analysis based exclusively on the relationship of the owner's basis or investment in the property and a comparison of its fair market value before and after the taking." This contention—which misstates the court of appeals' decision—has no merit. The court of appeals' analysis is not based *exclusively* on the value of the property as subject to the regulation; rather, the court held only that that value is one factor to be taken into consideration.

Petitioner then posits (Pet. 16-18) that the market value of the land cannot be considered, because that value is based on speculation that sometime in the future the Corps will issue a permit allowing the land to be used for mining. This argument misses the point. The court of appeals addressed the present value of the property in today's market—what a willing buyer would now pay to a willing seller, taking into account the present uncertainty as to how the property may be used in the future. This present market does not depend on future actions by the Corps. The focus is on the present value of the land and how it may affect an analysis of whether a taking has occurred. No estimation of the probability of future Corps action is necessary to determine that value.

Nor is petitioner correct in asserting that the court of appeals' approach "assures there can never be a regulatory taking" (Pet. 18). All the court said is that the present market value of the property is a pertinent factor in determining whether a taking has occurred. Plainly this does not amount to a holding that a regulatory taking may never occur.[10]

3. Petitioner's final contention (Pet. 18-21) is that it is due compensation for its entire 1,560-acre tract, even though the application to the Corps sought permission to mine only 98 acres. The court of appeals' opinion (Pet. App. 27-28) fully answers that contention. Even if it is assumed that any further

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[10] Petitioner does not challenge the alternative ground for the holding of the court of appeals: that errors in the trial court's factfinding procedures required reversal. Thus, no matter what the disposition of the questions raised in the petition, the case will have to be remanded to the trial court for further proceedings.

application for a mining permit would be denied by the Corps—an assumption which has not been established on the evidentiary record (see *id.* at 27)—there is no basis for requiring the United States to pay for the entire tract. It is conceded that in three years petitioner would mine only 98 acres. There is, accordingly, no basis upon which petitioner would presently be entitled to the windfall of compensation for land which it would not be able to mine for many years in the future.

Furthermore, as the court of appeals held (Pet. App. 28), it is sensible to use the 98 acres as a test case for determining whether the Corps' actions amount to a taking. If the refusal to permit limestone mining is held to be a taking, the Corps retains the authority to reach a different decision should petitioner request a permit to mine the remainder of the tract. If petitioner does make such an application for the remainder of its property, the Corps would be free to take into account any changed circumstances that may cause it to find that a mining permit would then be in the public interest. Unless and until all those eventualities come to pass, whatever claim petitioner asserts with respect to the remaining acreage is not ripe for adjudication. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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